No. 90-1594

Supreme Court, U.S.
FILED
APR 15 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

STEVEN LUNDBLAD,

Petitioner,

v.

RICHARD D. CELESTE; DOROTHY SHOEMAKER; WILLIAM NAPIER; and DONALD OLSON,

Respondents.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID RUDOVSKY
KAIRYS & RUDOVSKY
924 Cherry Street, #500
Philadelphia, PA 19107
(215) 925-4400
Counsel of Record
For Petitioner

SETH KREIMER
University of Pennsylvania
Law School
3400 Chestnut Street
Philadelphia, PA 19104
(215) 898-7447

JEFFREY M. DECILE
JAMES C. AYERS LAW OFFICES
165 N. High Street
Columbus, Ohio 43215
(614) 221-0770

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

I. Where this Court has consistently ruled that a state post-deprivation remedy will satisfy due process only when the deprivation is random and unauthorized, did not the lower court err in dismissing petitioner's due process claim where the deprivation of property was a direct result of an established state policy and procedure.

II. Did not the court below err in determining that state officials are entitled to qualified immunity from suit for having denied petitioner a state contract solely because of political patronage considerations, where Ohio had by legislation expressly required public contracts to be awarded on merit, and where this Court had clearly established that absent a state interest in patronage, free speech and equal protection principles prohibit discrimination based on political affiliation.

LIST OF PARTIES

In addition to the parties listed in the caption, the defendants Ronald James, Ohio Department of Natural Resources, (ODNR) and Myrl Shoemaker also participated in the proceedings below. The claims against Ronald James and ODNR were dismissed by the District Court. Upon the death of Myrl Shoemaker, the respondent Dorothy Shoemaker was substituted as a party-defendant.

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Petition For Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Steven Lundblad respectfully requests that a writ of certiorari issue to review the judgment entered in this case by the United States Court of Appeals for the Sixth Circuit on January 31, 1991.

OPINIONS BELOW

On June 25, 1984, the district court issued a judgment dismissing the case against the Ohio Department of Natural Resources on Eleventh Amendment grounds and dismissing the case against all respondents on a theory of res judicata, citing a prior state action concerning this matter. On appeal, the Court of Appeals reversed the dismissal against all respondents, finding that the res judicata doctrine did not bar this action. *Lundblad v. Celeste*, 772 F.2d 907 (6th Cir. 1985). These opinions are not reprinted in the Appendix because the issues are beyond the scope of this petition.

On remand the district court issued an opinion on June 12, 1987, denying respondents' motion to dismiss on the asserted grounds of failure to state a claim and qualified immunity. This opinion is reprinted at A.1.

The panel opinion of the Court of Appeals affirming the denial of the motion to dismiss the equal protection claim, but reversing the denial of the motion with respect to the First Amendment and Due Process claims is reported at 874 F.2d 1087 (6th Cir. 1989). It is reprinted at A.20.

The En Banc Opinion of the Court of Appeals dismissing the entire Complaint was issued on January 31, 1991. It is reprinted at A.43.

JURISDICTION OF THE COURT

The opinion of the Court of Appeals was entered on January 31, 1991. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

ORC §1501.091:

Contracts for the operation of public service facilities shall be made in writing by the director of natural resources with the person, firm, partnership, association, or corporation whose bid, in consideration of the public interest, is determined by the director to be the best bid received, after advertisement for bids has been published for four consecutive weeks in a newspaper having a general circulation in each county in which the facility is situated. Such notice for bids shall set forth the pertinent facts concerning the facility, the periods of required operation during the year, and shall refer to the conditions of operation and the terms of the contract which shall be on file in the office of the director and open to public inspection. Contracts for the operation of public service facilities shall contain provisions assuring that the facilities will be open to the public at reasonable rates and without discrimination as to race, creed or color, and such other provisions as the director deems necessary to satisfy the needs of the people of the state for public park facilities.

This section does not apply to any contract awarded under section 1501.011 [1501.01.1] of the Revised Code for the construction of a public service facility in consideration of a lease to operate the facility.

§1501.10 Lease provisions.

Advertisement for bids for the leasing of public service facilities in state parks shall be published in any newspaper of general circulation in Franklin county and each county in which the facility to be leased is situated. Such publication shall be made once each week for four consecutive weeks prior to the date fixed for the acceptance of such bids. Such notice shall set forth the pertinent facts concerning the facility to be leased, the periods of required operation during the year, and shall refer to the terms and condition[s] which such lease shall include, which shall be on file in the office of the director and open to public inspection.

Such public service facilities may be leased for such period of years as may be determined by the director of natural resources, provided, that the director may, at the expiration of the original lease, without advertisement for bids, grant the lessee a renewal of said lease for an additional period not to exceed four years. Leases executed under this section may contain any provisions which the director deems necessary, provided that the following provisions shall be contained in said leases.

(A) The lessee shall be responsible for keeping such facilities in good condition and repair, reasonable wear and tear and damages caused by casualty or acts beyond the control of lessee, excepted.

(B) The lessee shall operate the facilities for such periods during the year as the director of natural resources deems necessary to satisfy the needs of the people of the state; provided that such periods of

required operation must be set forth in the notice for the acceptance of bids.

(C) The lessee, upon the execution of the lease, shall furnish a bond to the state in an amount as prescribed by the director, conditioned that the lessee shall fully perform all terms of the lease.

The director may lease any public service facilities in state parks to the person, firm, partnership, association, or corporation who submits the highest and best bid under the terms set forth in this section and in accordance with the rules of the director, taking into account the financial responsibility and the ability of the lessee to operate such facilities. Bids shall be sealed and opened at a date and time certain, published in advance.

This section does not apply to an advertisement for a bid to construct a public service facility in consideration of a lease to operate the facility under section 1501.011 [1501.01.1] of the Revised Code or to a lease made pursuant to the award of such a bid.

STATEMENT OF THE CASE

A. Factual Background

Petitioner, Steven Lundblad, was from 1973 to 1982 the golf professional and concessionaire at the Punderson State Park in Geauga County, Ohio. He held this position pursuant to the award of a state contract and his work throughout this period was "excellent." 874 F.2d at 1099. In 1982, following the election of respondent Celeste as Governor of Ohio, the position which petitioner had held

was put up for bid. Under the pertinent provisions of Ohio law (ORC §§1501.091 and 1501.010) the state had the choice of operating the golf course under contract or lease, or could operate the facility with its own employees. The contractual arrangement was subject to the public bidding provisions of §1501.091, which specifically mandated that the contract be awarded to the person making the "best bid."

Petitioner and three other persons submitted bids to operate the golf course. On March 2, 1983, respondent Donald Olson, the head of the Parks and Recreations Division of the Ohio Department of Natural Resources ("ODNR"), reviewed the qualifications of the four bidders and recommended that petitioner be awarded the contract. Olson's official evaluation stated:

> Steven M. Lundblad's bid offers a high return to the State and is substantiated with a thorough plan of operation and sound *pro forma*. He is a PGA member and has successfully operated the pro shop for nine years. He is proposing continued on site management and expansion of services for the public. He has adequate financial resources for the scope of this operation.
>
> In consideration of the above information, I feel that the bid submitted by Steven M. Lundblad is the best bid received." (Appendix, 93, Court of Appeals)

On March 21, 1983, at the request of the Deputy Director of ODNR, Mr. Olson again reviewed the bids and again recommended that petitioner be awarded the bid:

> " . . . Based upon the financial data provided, it appears that neither Mayfly Outfitters nor

> Robert Grant would be financially able to operate the facility. In consideration of the differences amongst proposals (particularly in the areas of financial ability, experience, and proposed services), I maintain that Steven Lundblad submitted the best bid for the operation of the Punderson Golf Course Pro Shop." (Appendix, 89, Court of Appeals).

In the face of overwhelming documentation that petitioner had submitted the "best bid," Director Shoemaker awarded the contract to Robert Grant, a person with no experience in the field and without the financial resources to properly operate the facility. Petitioner alleged, and the courts below properly assumed, that the decision to award the contract to Grant was based solely on partisan politics and patronage considerations. Grant was recommended for this position by an official in the state Democratic Party, and the respondents had implemented a policy of limiting these contracts and other types of state employment to Democrats.

On April 3, 1983, petitioner filed suit in the Court of Common Pleas of Franklin County, Ohio, seeking injunctive relief. He obtained a temporary restraining order enjoining the award of the contract to Grant. On April 16, 1983, Director Shoemaker accepted Grant's withdrawal from the bidding process. Thereafter, to implement the patronage policy, Shoemaker decided to operate the golf course with ODNR employees.

Petitioner has alleged and stands ready to prove that the sole reason for the decision to cancel the bidding process was to ensure that non-Democrats would not be permitted to operate this facility as part of a larger policy of patronage appointments. Since it was apparent that

petitioner had submitted the "best bid," the only recourse open to the respondents to implement their policy of denying contracts or employment to non-Democrats, was to self operate the golf course. A.23-24.

B. Proceedings Below

Petitioner filed suit in the United States District Court in May, 1983 alleging that the respondents and others had violated his rights to free speech, association, equal protection and due process of law by arbitrarily denying him the contract to operate the golf course.

The district court granted respondents' motion to dismiss on res judicata grounds (based on the judgment rendered by the Ohio Court of Common Pleas in petitioner's state court action). The district court also granted dismissal to ODNR on Eleventh Amendment immunity grounds.

On appeal, the Court of Appeals for the Sixth Circuit reversed the res judicata decision and remanded. (The dismissal of ODNR was not appealed). 772 F.2d 907 (6th Cir. 1985).

In the district court the respondents renewed their motion to dismiss, claiming entitlement of qualified immunity from damages.[1] The district court denied the motion. On appeal, a divided panel of the Sixth Circuit ruled that the respondents were (1) entitled to qualified

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[1] Petitioner joined a second action against Ronald James, Deputy Director of Resource Management for ODNR, but that matter was dismissed on statute of limitation grounds and is no longer part of this case.

immunity on the first amendment claim, (2) not entitled to qualified immunity on the equal protection claim, and (3) not subject to suit for a due process violation because of the availability of a post-deprivation remedy in state court. Judge Ryan dissented on the due process and equal protection issues. 874 F.2d 1097 (6th Cir. 1989).

On *en banc* rehearing, the Court of Appeals on January 31, 1991 ruled that the respondents were entitled to qualified immunity on the equal protection claim and ordered the complaint dismissed. The Court of Appeals did not address the central argument made by petitioner: since the State of Ohio had by statute specifically disavowed patronage as a state interest and had required that the contracts be awarded on merit, settled first amendment and equal protection principles prohibited the use of partisan political criteria in the contracting process.

The Court of Appeals also ignored the rulings in *Parratt v. Taylor*, 451 U.S. 527 (1981), *Hudson v. Palmer*, 468 U.S. 517 (1984), and *Zinermon v. Burch*, 110 S.Ct. 975 (1990), that the availability of state post-deprivation remedies will negate a due process claim only when the deprivation occurs as a result of a random and unauthorized act. In this case, the deprivation – the arbitrary denial of petitioner's bid – was pursuant to a deliberately adopted state policy and practice.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals is in Direct and Irreconcilable Conflict with Due Process Principles Established By An Unbroken Line of Cases in this Court.

Petitioner asserted that his state protected property interests were denied without due process of law. In Ohio, a bidder for a state contract has a protected interest in a fair determination of his bid for the contract. ORC §§1501.09, 1501.091 and 1501.10 (set forth *supra*, at 3-5) require that state contracts be awarded to the "best bid received" (or in lease situations to the "highest and best bid"). These provisions established a protected property interest in the bidder sufficient to entitle petitioner to due process protections. See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Memphis Light, Gas & Water Div. v. Craft*, 438 U.S. 1 (1978).[2]

The court below correctly assumed "that [petitioner] held a property interest in the fair and non-arbitrary evaluation of his bid . . . ," 874 F.2d at 1102, but inexplicably went on to hold that the "procedural due process

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[2] The district court found, and the court of appeals assumed, that petitioner had a sufficiently protected interest under state law to mandate due process protection against an arbitrary denial of the contract. There is strong support for this view. See, e.g., *Bd. of Educ. v. Sever-Williams Co.*, 22 Ohio St.2d 107, 115 (1970); *Boren & Guckes v. Comm's of Darke Cy.*, 21 Ohio St. 311, 322 (1871) (analogous bidding provision meant to promote "open and honest competition" to protect the public *"as well as the bidders themselves . . . "*) (Emphasis added). This issue is not presented by this petition since it was not decided by the court of appeals.

claim must fail because [petitioner] has adequate post-deprivation remedies available under Ohio law." *Id.* That ruling could not be wider of the mark. The court of appeals ignored the cases in this Court that have explicitly held that the availability of state post-deprivation remedies is relevant only where the deprivation was "random" and "unauthorized." This Court has repeatedly ruled that post-deprivation remedies do not satisfy due process where a deprivation of property is caused by conduct pursuant to established state procedure, rather than random and unauthorized action. *Hudson v. Palmer, supra* at 532. See also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Parratt v. Taylor, supra.*

As Judge Ryan correctly noted in dissent, 874 F.2d at 1106-07, petitioner claims not a random denial of his bid, but rather a denial motivated and caused by a state policy and practice of denying petitioner and any other non-Democrats of state contracts, regardless of the merits of their bids or their individual qualifications. Such a policy is the antithesis of the unauthorized actions subject to correction in a state post-deprivation proceeding.

It is difficult to imagine a more direct and irreconcilable conflict between a principle established by this Court and an errant opinion of a court of appeals. Certiorari should be granted to ensure the correction of this plainly erroneous ruling.

II. Respondents are not Entitled to Qualified Immunity where Both State Law and the First and Fourteenth Amendments Clearly Established that Political Patronage Could Play no Legitimate Role in the Awarding of Public Contracts.

Certiorari should also be granted to review the decision of the court below to grant qualified immunity from

damages for the violation of petitioner's First and Fourteenth Amendment rights to be free from political and patronage-based discrimination in his bid for a public contract.

A. The qualified immunity doctrine excuses government officials from liability where the right violated was not sufficiently "clearly established" to put a reasonable official on notice that the challenged conduct was unconstitutional. However, "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in light of preexisting law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 685 (1987).

As we demonstrate below, it was clearly established in 1983 that patronage-based discrimination in the awarding of public contracts violated First Amendment and Equal Protection principles. See *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980). The respondents did not have to predict the future of constitutional law to understand that their denial of petitioner's bid violated controlling constitutional principles. But even if the application of *Burns* and *Branti* to this case was in any sense questionable, the fact that the State of Ohio had by merit-legislation expressly disclaimed any interest in patronage contracting precludes any argument that the respondents could, consistent with the First Amendment, deny petitioner a contract because he was not a Democrat.

The division in this Court in *Elrod* and *Branti* was on the issue of whether long standing patronage practices

are violative of the First Amendment. All Members of the Court agreed that *absent* a state's asserted countervailing interest in patronage, the First Amendment claim would be beyond dispute. Justice Powell, who wrote dissenting opinions in both cases, expressly recognized that the state's interest could only be asserted where the patronage system was authorized by long standing practice and not countermanded by "merit" legislation.

In *Branti*, Justice Powell asserted that prior public employment cases were not controlling since they did not involve patronage, and stated:

> "The constitutionality of appointing or dismissing public employees on the basis of political affiliation *depends upon the governmental interests served by patronage*. . . . This inquiry cannot be resolved by reference to First Amendment cases in which patronage was neither involved nor discussed." *Id.* at 527. (Emphasis added).

In *Elrod, supra* at 381, Justice Powell stated that the question presented:

> " . . . is whether it is consistent with the First and Fourteenth Amendments for a State to offer some employment conditioned, explicitly or implicitly, on partisan political affiliation and on the political fortunes of the incumbent officeholder. This is to be determined, as the plurality opinion agrees, by whether patronage hiring practices sufficiently advance important state interests to justify the consequent burdening of First Amendment interests."

See also, *Rutan, supra* at 2696 (Scalia, J., dissenting).

The court below granted qualified immunity on the mistaken premise that petitioner's claim, like those

addressed by this Court in *Elrod v. Burns, supra, Branti v. Finkel, supra* and *Rutan v. Republican Party*, 110 S.Ct. 2729 (1990), was one that pitted the individual's right to free speech, association and equal protection against a clearly asserted state interest in patronage. However, the conflict between these competing interests is not involved in this case. The State of Ohio has legislatively disclaimed any patronage interest in the state contracting process. The statutes controlling the bidding and contract award system are based on merit and require the contract to be based on the "best bid." ORC §1501.091.

Since the state legislature had decided that economic benefits to the state, rather than political considerations, should be the determinative factor in the letting of ODNR's contracts, the state cannot assert a countervailing patronage interest. See, *Allegheny Pittsburgh Coal Co. v. County Com'n*, 109 S.Ct. 633 (1989) (while states have broad power to differentiate taxes according to different property classifications, where state law does not draw distinctions between properties and its Constitution requires uniform taxation rates, state officials violate Equal Protection by deviating from uniform rates). Accordingly, the controlling constitutional principle in effect in 1983 was that articulated by this Court in *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947), that "Congress may not enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office . . . " See also *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961).[3]

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[3] In 1947 the Sixth Circuit also recognized that such discrimination is prohibited. *Glicker v. Michigan Liquor Control*

(Continued on following page)

B. Even if there was no merit-based selection statute in effect, the law was clearly established in 1983 that patronage-based denials of public contracts were unconstitutional.

In *Branti v. Finkel, supra*, this Court explicitly disapproved of the practice of conditioning a public defender's hiring on party affiliation: "[I]t is difficult to formulate any justification for tying *either the selection or retention* of an assistant public defender to his party affiliation." *Id.* at 520, n.14 (emphasis added). A reasonable public official would have heeded this express statement of constitutional principle by the Supreme Court. Indeed, in *Branti*, the dissent noted that the Court did not distinguish between discharges and hirings. Referring to the language cited above, Justice Powell stated:

> "If this . . . statement is not a holding of the Court, it at least suggests that the Court perceives no constitutional distinction between

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(Continued from previous page)

Commissioner, 160 F.2d 96 (6th Cir. 1947) (discrimination for political reasons, by a state or its agents in the revocation of a liquor license, violates equal protection).

Respondents have argued that the final decision to operate the facility by state employees eliminates any constitutional objection to their actions. This assertion, which was rejected by the panel and not addressed by the *en banc* court (and therefore is not presented in this petition) is erroneous. This Court has repeatedly held that governmental acts disadvantaging citizens are unconstitutional where they would not have occurred but for an invidious purpose. See, e.g., *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Anderson v. Martin*, 375 U.S. 399 (1964); *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *Cf. Heckler v. Mathews*, 465 U.S. 728 (1984).

> selection and dismissal of public employees." *Id.* at 522, n.2.

Further, as this Court emphasized in *Rutan*, this constitutional principle has been embodied in "[d]ecades of decisions by this Court." *Rutan*, 110 S.Ct. at 2738.

> [R]espondents contend that the burden imposed [by patronage hiring] is not of constitutional dimension. Decades of decisions by this Court belie such a claim. . . . Almost half a century ago, this Court made clear that the government "may not enact a regulation providing that no Republican . . . shall be appointed to federal office." *Public Workers v. Mitchell*, 330 U.S. 75, 100, . . . (1947). . . . *Under our sustained precedent, conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition*, unless the government has a vital interest in doing so. *Rutan*, 110 S.Ct. at 2738, 2739 (notes, parallel citations omitted; emphasis added).

Given this "sustained precedent," the respondents need not have "predicted the future" of constitutional law to realize that their actions were unconstitutional.

CONCLUSION

For the reasons stated above, the Petition for Certiorari should be granted.

Respectfully submitted,

David Ruiovsky
Kairys & Ruiovsky
924 Cherry Street, #500
Philadelphia, Pa. 19107
(215) 925-4400
Counsel of Record
For Petitioner

Seth Kreimer
University of Pennsylvania
Law School
3400 Chestnut Street
Philadelphia, Pa. 19104
(215) 898-7447

Jeffrey M. Decile
James C. Ayers Law Offices
165 N. High Street
Columbus, Ohio 43215
(614) 221-0770

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Steven Lundblad,

Plaintiff,

vs.

Richard F. Celeste, et al.,

Defendant.

Case No. C-2-83-906
JUDGE GRAHAM

Steven Lundblad,

Plaintiff,

vs.

Ronald James,

Defendant.

Case No. C-2-86-0402
JUDGE GRAHAM

MEMORANDUM AND ORDER

I. INTRODUCTION

This matter is before the Court on the defendants' motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and (e). The grounds asserted are 1) failure to state a claim upon which relief can be granted; 2) the defendants are entitled to qualified immunity; and 3) the claims against Defendant James are time-barred. For the reasons set out below, Defendant James' motion is GRANTED in its entirety and the motions of the other defendants are GRANTED in part and DENIED in part.

II. FACTS AND PROCEDURAL HISTORY

Plaintiff Steven Lundblad alleges that in 1983 he was wrongfully denied a contract to run the golf course concession at Punderson State Park in Geauga County, Ohio,

because he was not a democrat. His complaint is brought pursuant to 42 U.S.C. §§1981, 1983, 1985, 1986; 28 U.S.C. §§1331, 1343; the First and Fourteenth Amendments to the United States Constitution, the Ohio Constitution, and Ohio Revised Code §1501.091.

The plaintiff had operated the Punderson State Park golf course for nine years from 1973 and through 1982. For the first five years the plaintiff leased the facilities from the Ohio Department of Natural Resources ("ODNR") pursuant to Ohio Revised Code §1501.09. That lease was renewed one time for another four years without competitive bidding as permitted under Ohio Revised Code §1501.10.

In late 1982, the director of ODNR, Myrl Shoemaker, advertised for public bids to operate the Punderson golf course starting with the 1983 season. Four bids were submitted and internal ODNR documents indicate that the plaintiff's bid was twice recommended by Defendant Olson as "the best bid . . . in consideration of the public interest." Ohio Revised Code §§1501.091, 1501.10 (Attachments to Plaintiff's memo contra filed February 24, 1986, Doc. #71). However, on April 1, 1983, the contract was awarded to Robert Grant who the department at one time had considered financially unqualified.

On April 6, 1983, the plaintiff filed a verified complaint in Franklin County Court of Common Pleas, Case No. 83CV-04-2067, seeking an injunction requiring the defendants to award the contract to him. After an oral hearing on April 6, a preliminary injunction was issued. On April 16, 1983, Robert Grant wrote ODNR "requesting [ODNR] permission to withdraw from the Punderson

State Park Golf Pro Shop Concession Agreement which we entered into based upon the competitive bidding award of April 1, 1983." Mr. Grant's proferred reason for withdrawal was the litigation initiated by the plaintiff. (Exhibit "D" of Defendants' July 18, 1983 motion for protective order, Doc. #12).

At an oral hearing on April 20, the State indicated that the contract would not be awarded to Mr. Lundblad, but rather the ODNR was going to self-operate the concession under the authority of Ohio Revised Code §1501.09. Because of that decision, the Court of Common Pleas granted the defendants' motion to dismiss because the controversy was moot.

On May 13, 1983, suit was filed in this court naming as defendants Richard Celeste, Governor; Dorothy Shoemaker, Executor of the Estate of Myrl Shoemaker, formerly Director of the ODNR; William Napier, Deputy Director of ODNR; and Donald Olson, Deputy Chief, ODNR. After an oral hearing, Judge Robert M. Duncan granted the Defendants' motion for summary judgment, holding that the Eleventh Amendment bars the award of money damages against the state and that the dismissal for mootness in State Court barred any money damages against the defendants in their individual capacities because of *res judicata*. That decision was reversed and remanded by the Sixth Circuit Court of Appeals. That court's decision of August 22, 1985 held that the state court dismissal for mootness was otherwise than on the merits and was therefore without prejudice under Rule 41(B)(4)(a) of the Ohio Rules of Civil Procedure and that accordingly plaintiff's claims are not barred by *res judicata*.

On October 31, 1985, plaintiff filed an amended complaint which deleted the ODNR as a defendant and increased the monetary damages sought. On December 12, 1986, plaintiff once against [sic] amended his complaint in order to add a claim of fraudulent concealment by the defendants of the role that Ronald James played in the alleged deprivation of plaintiff's rights. Mr. James is the defendant in a companion case, *Lundblad v. James*, Case No. C-2-86-402, which was filed on April 14, 1986 and which was consolidated with Case No. CV-83-0906 on June 11, 1986.

Defendants filed motions to dismiss in both cases asserting that the complaints fail to state a claim upon which relief can be granted, all defendants are entitled to immunity and in the case of defendant James, all claims are barred by the state of limitations. These motions to dismiss are now before the Court.

DISCUSSION

A. Standard of Review

A motion to dismiss for failure to state a claim "should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would enable him to relief." *Conley v. Gibson*, 35 U.S. 41, 45-46 (1957). All allegations of the complaint are construed most favorably toward the nonmovant and are accepted as true. *Jenkins v. McKeithen*, 395 U.S. 411 (1969). Motions to dismiss claims made under the civil rights statutes are given special scrutiny. *Westlake v. Lucas*, 537 F.2d 857 (6th Cir. 1976); *Brooks v. Seiter*, 779 F.2d 1177 (6th Cir. 1985). A claim barred by the statute of

limitations may be determined in a motion to dismiss. *General Instrument Corp. v. American Home Assur. Co.*, 397 F. Supp. 1074 (E.D. Pa. 1975). All well-pleaded allegations must be taken as true, *Scheuer v. Rhodes*, 416 U.S. 232 (1974), and if matters outside the pleadings are considered, then a 12(b) motion is converted into one for summary judgment.

B. Statute of Limitations

Defendant James asserts that all claims against him are barred by the statute of limitations. As a matter of law, Ohio Rev. Code §2305.11 provides a one year state of limitations for all 42 U.S.C. §1983 actions. *Mulligan & Hazard*, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 2902 (1986). A one year statute of limitations also applies to all §1981 actions. *Demery v. City of Youngstown*, Case No. 86-3261 (6th Cir.), decided May 12, 1987.

While Ohio law provides the length of the period of limitation for §1983 actions, Federal law governs such matters as accrual of an action and tolling of the statute. *Silverberg v. Thompson McKinnon Securities, Inc.*, 787 F.2d 1079 (6th Cir. 1986); *Peck v. United States*, 470 F. Supp. 1003 (S.D. N.Y. 1979).

A cause of action under the civil rights statutes accrues when a tortfeasor interferes with a victim's rights. If a plaintiff has notice of wrongful conduct, it is not necessary that he have knowledge of all the details or all of the parties in order for a cause of action to accrue. *Compton v. Ide*, 732 F.2d 1429 (9th Cir. 1984).

The wrongful act alleged is the denial of a concession contract with the state. This occurred in 1983. Plaintiff alleges that defendant James conspired with the defendants named in a companion case, Case Number CV-2-83-906, *Lundblad v. Celeste*, to deny the plaintiff his constitutional rights. However, the "mere continuance of a conspiracy beyond the date when injury or damage occurs does not extend the statute of limitations." *Compton v. Ide, supra* at 1432; *Hoffman v. Holden*, 268 F.2d 280 (9th Cir. 1959) *overruled in part on other grounds, Cohen v. Norris*, 300 F.2d 24 (9th Cir. 1962) (*en banc*).

Under specific circumstances, tolling of the statute of limitations is recognized. Federal courts have applied the "due diligence – discovery" rule in civil rights cases when the defendants have actively sought to fraudulently conceal a cause of action. *Rinehart v. Locke*, 454 F.2d 313 (7th Cir. 1971), or when the injury is "inherently unknowable". *Cox v. Stanton*, 529 F.2d 47 (4th Cir. 1975). The due diligence – discovery rule postpones accrual "until the plaintiff has or with reasonable diligence should have discovered the critical facts." *Diminnic v. United States*, 728 F.2d 301 (6th Cir. 1984), *cert. denied*, 469 U.S. 842 (1984), *quoting Barrett v. United States*, 689 F.2d 324 (2d Cir. 1982). The issue in this case is whether Defendant James can be sued three years after the accrual of the cause of action because of alleged fraudulent concealment by the defendants.

The Sixth Circuit Court of Appeals in *Diminnic* stated that the doctrine of equitable tolling of a statute of limitations based upon the doctrine of "concealment involves a matter of fraud or constructive fraud on the part of the party sought to be held responsible, for it makes little

sense to impose the responsibility for delay upon a party innocent of causing it." *Id.* at 305. The party to be charged with fraudulent concealment must play an active role in the concealment. Mere passive refusal to come forth with crucial facts is insufficient.

Diminnic involved a suit against a federal agent under the Federal Tort Claims Act, 28 U.S.C. §2671 *et seq.* The agent had allowed an innocent person to be tried and convicted for crimes the agent had committed. Nevertheless, the government was held not liable because it had not actively helped the agent conceal his guilt and, therefore, the accrual of the statute of limitations was not tolled. The plaintiff's action was held to be time-barred. The court went on to state that as morally wrong as the agent's action was, he was not required to come forward and confess. "No balance of moral positions, justice, and policy can require [the agent] to surrender his Fifth Amendment rights under threat of civil tort liability, for the creation of a tort duty would necessarily require the surrender of his Fifth Amendment privilege against self-incrimination." *Id.* at 1196. Since a state official can be subject to criminal liability for misfeasance in office, the same analysis applies. *See* Chapter 2921, Ohio Revised Code. A defendant has no obligation to come forward with any information regarding his role or anyone else's role in the alleged conspiracy.

The facts alleged to establish fraudulent concealment, even if true, do not serve to toll the statute of limitations against defendant James. In *Hohri v. United States*, 782 F.2d 227 (D.C. Cir. 1986); *cert. granted*, 55 U.S.L.W. 3357 (1986), the court held that the fraudulent concealment

must prevent the plaintiff from alleging a "crucial element" of his claim, and not merely conceal the fact of the injury *or the identity* of the inflictor (emphasis added). *See, Cain v. United States*, 643 F. Supp. 175 (S.D. N.Y. 1986).

The plaintiff in this case was sufficiently aware of all elements of his cause of action to file and vigorously pursue his claims in the companion case of *Lundblad v. Celeste*, Case No. C-2-83-0906. The claims in that case are identical to the claims alleged against Defendant James. Nothing that the defendants have allegedly done as stated by plaintiff's Second Amended Complaint rises to fraudulent concealment for the purpose of tolling the one year statute of limitations applicable to 42 U.S.C. §1983 and §1981 actions. Therefore, all claims against defendant James are dismissed as time-barred.

C. 1985 and 1986 Claims

In order to maintain an action under 42 U.S.C. §1985 there "must be some racial, or perhaps otherwise class-based invidiously discriminating animus behind the discriminators' action." *Griffin v. Breckenridge*, 403 U.S. 88, 101-102 (1970). The Supreme Court did not specify which classes might be protected. However, the Sixth Circuit has discussed the scope of the persons protected in *Browder v. Tipton*, 630 F.2d 1149 (6th Cir. 1980) where the court stated:

> We hold that the class of individuals protected by the "equal protection of the laws" language of the statute are those so-called "discrete and insular" minorities that receive special protection under the Equal Protection Clause because of inherent personal characteristics. The persons

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> protected under the "equal privileges and immunities" language of the statute are those individuals who join together as a class for the purpose of asserting certain fundamental rights.

Id. at 1150.

See also *Wilson v. Moss*, 537 F. Supp. 281 (S.D. Ohio 1982) (psychologists are not "discrete and insular minority" at least for purposes of constitutional analysis under 42 U.S.C. §1985(3)).

In *United Brotherhood of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825 (1983), Justice White delivered the Opinion of the Court and stated:

> In the first place, it is a close question whether §1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans. . . . The predominant purpose of §1985(3) was to combat the prevalent animus against Negroes and their supporters.

Id. at 836.

There is no characteristic of the plaintiff that qualifies as an "immutable characteristic" so that any alleged conspiracy comes under the aegis 42 U.S.C. §1985(3). Consequently, the plaintiff fails to state a claim under 42 U.S.C. §1985(3) against all named defendants.

Plaintiff has also alleged jurisdiction under 42 U.S.C. §1986 which states in part:

> "Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in §1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same,

> neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; . . . But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued."

By its terms, §1986 has a one-year statute of limitations and is dependent upon a valid 42 U.S.C. §1985 claim. *Browder v. Lipton, supra.* Even if plaintiff had stated a valid §1985 claim, it would be barred by the statute of limitations against defendant James because when a §1986 claim is brought in tandem with a §1985 claim both are controlled by the 1986 one year statue of limitations. *Carter v. City of Emporia,* 543 F. Supp 354, 357 (D. Kan. 1982). The date upon which plaintiff would have known that there was a conspiracy was in the spring of 1983. Therefore, even if the §1985 claim had been valid, the §1986 claim would be barred by the applicable statute of limitations against Defendant James. Since the court holds that the plaintiff has failed to state a claim against any defendant under §1985(3), all 42 U.S.C. §1986 claims against all defendants also fail.

D. Section 1981 Claims

Title 42 U.S.C. §1981 states:

> All persons within the jurisdiction of the United States shall have the same right in every State

> and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

In order to state a claim under §1981, the plaintiff must show that the defendants intentionally discriminated on account of race in the plaintiff's pursuit of one of the enumerated activities. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, (1968). Conclusory allegations of generalized racial bias are insufficient to establish the necessary discriminatory intent. *Minority Police Officers Association v. South Bend*, 801 F.2d 964 (7th Cir. 1986). Nowhere in the three volumns [sic] of pleadings that have been filed in this case are there any allegations of any sort that suggest intentional racial discrimination on the part of the defendants. Nor does the plaintiff plead any allegations of discrimination based upon race even under the liberal construction of §1981 recently enunciated by the Supreme Court in *St. Francis College v. Al-Khazraji*, 55 U.S.L.W. 4626, (decided May 18, 1987). Therefore, the plaintiff's claims under 42 U.S.C. §1981 are dismissed against Defendant James as being time-barred and against all other defendants for failure to state a claim.

E. §1983 Claims

Title 42 U.S.C. §1983 states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

> State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

It is well established that in order to recover under §1983, a plaintiff must plead and prove at least: (1) that he has been deprived of a right "secured by the Constitution and laws" of the United States and (2) that the defendant deprived him of his rights while acting under the color of law. *Coffy v. Multi-County Narcotics Bureau*, 600 F.2d 570, 576 (6th Cir. 1979); *Gomez v. Toledo*, 446 U.S. 635 (1980). As a part of this burden of proof, the plaintiffs must establish that the defendants were involved in the activity violative of their constitutional rights. It is insufficient to base liability upon the general doctrine of *respondeat superior, i.e.*, that a defendant was in a supervisory position. *Monell v. New York Department of Social Services*, 436 U.S. 691-694 (1978); *Coffy v. Multi-County Narcotics Bureau, supra* at 580. Rather, the plaintiff must show that the defendants were personally involved in the alleged illegal conduct. *Id.* at 580; *Jones v. Denton*, 527 F. Supp. 106, 109 (S.D. Ohio 1981). *Cf. Rizzo v. Goode*, 423 U.S. 362, 373-377 (1976).

"By enactng [sic] O.R.C. §1501.091 the General Assembly recognized that there may be sound business and economic reasons why the public is better served by

private rather than state operation of certain public service facilities." *Sovine v. Teater*, 47 Ohio App.2d 254, 256, 353 N.E.2d 880, 882 (1976). The Ohio Supreme Court has construed similar statutes that, like Ohio Revised Code §1501.091, require publication of the bid specifications and award of the contract to the lowest or highest and best bidder, depending upon whether the contract is to maximum income or minimize outgo.

The Director of ODNR was under no obligation to award a contract but if he chose to let a contract, which he did, then under Ohio law and the express language of the applicable statute, he must select "in consideration of the public interest . . . the best bid received." Ohio Revised Code §1501.091. In determining who submitted the best bid, the ODNR Director must exercise his discretion in a non-arbitrary fashion. The Ohio Supreme Court held that it was an abuse of discretion to award a contract on the basis of unannounced and unestablished guidelines. The court, quoting the trial court, stated: " '[t]he lack of an announced standard and priority of miscellaneous considerations allows unbridled discretion and political favoritism.' We find neither allegations nor proof of political favoritism. However, we do find, due to the lack of announced standards, that appellant's action in this case was arbitrary". *Dayton, ex rel. Scandrick v. McGee*, 67 Ohio St. 2d 356, 361; 423 N.E.2d 1095, 1098. The plaintiff has alleged political favoritism and arbitrary and unannounced standards. This is a factual matter which precludes granting the defendants' motion to dismiss.

> [1,2] "The meaning of the term 'abuse of discretion' * * * connotes more than an error of law or

> of judgment; it implies an unreasonable, arbitrary or unconscionable attitude * * *." *Steiner v. Custer* (1940), 137 Ohio St. 448, 31 N.E.2d 855, paragraph two of the syllabus; *Conner v. Conner* (1959), 170 Ohio St. 85, 162 N.E.2d 852; 262 N.2d 685, and *State v. Adams* (1980), 62 Ohio St.2d 151, 404 N.E.2d 144. "Arbitrary" means "without adequate determining principle; * * * not governed by any fixed rules or standard.' Black's Law Dictionary (5 Ed.). "Unreasonable" means irrational." *Id.*

McGee, supra, 423 N.E.2d at 1097. Abuse of discretion has also been held to mean "a discretion . . . exercised to an end or purpose not justified by and clearly against reason and evidence." *State ex. rel. Shafer v. Ohio Turnpike Commissioner,* 159 Ohio St. 581, 591, 113 N.E.2d 14, 19 (1953).

It is not an abuse of discretion to determine to grant one bidder the contract but prior to notification of that bidder to then reject all bids provided "no *vested right of others [bidder] has intervened.*" (Emphasis added). *State ex. rel. Clevelnd* [sic] *Trinidad Paving Co. v. Board of Public Service of Columbus,* 81 Ohio St. 218, 225; 90 N.E. 389, ___ (1909). A granting agency has continuing jurisdiction to reconsider its decision until the institution of court proceedings attacking such decision. *State ex. rel. Maxson v. Board of County Commissioners,* 167 Ohio St. 458, 149 N.E.2d 918 (1958). The Ohio Supreme Court also held that it was an abuse of discretion and denial of equal protection to refuse to award a contract to the lowest and best bidder simply because the lowest bidder used non union versus union labor. *State ex rel. United District Heating, Inc. v. State Office Bldg. Comm.,* 125 Ohio St. 301 (1932).

This Court finds persuasive the reasoning of Judge Harvey in *Kasom v. City of Sterling Heights*, 600 F. Supp. 1555 (E.D. Mich. 1985), *aff'd.*, 785 F.2d 308 (6th Cir. 1986):

> [W]here a state statute requires public works contracts to be awarded to the lowest qualified bidder, and where a decision has been made to award such a contract, bidders have a *limited* property interest in not having the procedure, which regulates the enjoyment of the benefit sought, applied in an arbitrary or capricious manner. (citation omitted) "An entitlement may exist with respect to a benefit which is sought but not yet obtained whenever state law limits the exercise of discretion by the state official responsible for conferring the benefit." *Hixon v. Durbin*, 560 F. Supp. 654, 659 (E.D. Pa. 1983).

Id., at 1559.

Protected property and liberty interests emanate not only from the Constitution but also from state statutes and customs which create legitimate claims of entitlement. *Board of Regents v. Roth*, 408 U.S. 564 (1972). The "existing rules or understandings" of the statutes and procedures involved in awarding contracts under Ohio statutes and case law creates a limited property interest of sufficient magnitude to invoke the equal protection and due process clauses of the Fourteenth Amendment. *Kasom, supra; Three Rivers Cablevision, Inc. v. City of Pittsburgh*, 502 F. Supp. 1118 (W.D. Pa. 1980). The plaintiff has alleged sufficient facts to state a cause of action under 42 U.S.C. §1983.

Plaintiff's complaint also alleges that the defendants' conduct is pursuant to an established policy of the Celeste administration and is not a random and

unauthorized act. Therefore, the requirement of pleading the inadequacy of state post-deprivation procedures need not be met. *Spruytte v. Walters*, 753 F.2d 498 (6th Cir. 1985), *cert. denied*, 106 S.Ct. 788 (1986).

F. Infringement of First Amendment Rights

In addition to denial of due process and equal protection under the Fourteenth Amendment, plaintiff alleges that his First Amendment right to freedom of political association was impaired by the defendants' actions. Freedom of political association is protected by the First Amendment. *Buckley v. Valeo*, 424 U.S. 1 (1976). In a different context, the Supreme Court has held that non-renewal of an employment contract may not be predicated on the exercise of First and Fourteeth [sic] Amendment rights. *Perry v. Sindermann*, 408 U.S. 593 (1972).

In *Elrod v. Burns*, 427 U.S. 347 (1975), Justice Brennan wrote that the states could not "deny a benefit to a person because of his constitutionally protected interests – especially, his interests in freedom of speech or association." To do so would chill the exercise of those freedoms. *Id.* at 359. "Rights are infringed both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason." *Id.* at 360, n. 13. The "penny" in this case is the contract which was granted to Mr. Grant. If that contract was granted under facts that support a claim of abuse of discretion and in the interest only of political patronage, a claim under 42 U.S.C. 1983 and the First Amendment has been stated. However, the Sixth Circuit has recently decided that if a constitutional claim is stated under

§1983, then that statute is the exclusive remedy for First Amendment violations. *Thomas v. Shipka*, 6th Cir., Case No. 86-3230 (decided May 1, 1987).

G. Qualified Good Faith Immunity

Finally, the defendants argue that they are entitled to qualified good faith immunity. This is a question of law for the Court to decide. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). An official is immune unless the conduct "violates clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. *Davis v. Scherer*, 468 U.S. 183 (1984); *Huron Valley Hospital, Inc. v. City of Pontiac*, 792 F.2d 563 (6th Cir. 1986).

The ODNR was dismissed from the suit on the basis of Eleventh Amendment Immunity. The Eleventh Amendment also bars recovery of damages against an individual government officer who is sued in his official capacity, since in such suits that state entity is the real party in interest and the state treasury is the source of recovery for any damage award. However, officials are not immune from injunctive and declaratory relief. *Brandon v. Holt*, 469 U.S. 464 (1985); *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978); *Kentucky, Bureau of State Police v. Graham*, 53 U.S.L.W. 4966 (June 25, 1985).

Personal-capacity suits, in contrast, seek to impose personal liability upon a government official for actions he takes under color of state law. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). An award of damages against an official in his personal capacity can be executed only against the

official's personal assets. *Kentucky, Bureau of State Police v. Graham, supra* at 4967.

Judge Duncan's decision did not determine whether the defendants were sued in their individual capacities since he held that those claims, if any, were barred by *res judicata*. The complaint does not clearly specify whether the named defendants are being sued in their personal or official capacity or both. Therefore, the Court must look to the course of the proceedings to determine the nature of the liability sought to be imposed. *Brandon v. Holt, supra* at 469.

The caption of the complaint lists the names, official titles and business addresses of the defendants. Plaintiff, however, moved pursuant to Fed. R. Civ. P. 25 to substitute Dorothy Shoemaker as a party defendant after the death of her husband. That motion was granted on December 6, 1985 by Magistrate Abel. By requesting the substitution of the administratrix of Mr. Shoemaker's estate rather than his successor in the position of Director of the ODNR, the plaintiff invoked section (a) of the Rule 25. The Notes of Advisory Committee on Rules for the 1961 Amendments state that Rule 25(a) applies to those "infrequent actions which are directed to securing money judgments against the named officers enforceable against their personal assets." Therefore, this Court finds that the course of the proceedings in this case indicates that the named officials are being sued in their official and personal capacities.

An official sued in his personal capacity may assert the defense of a qualified good faith immunity. *Harlow, supra*. Officials do not forfeit their immunity by violating the clear command of a statute or regulation, federal or

state, unless that statute or regulation provides the basis for the cause of action sued upon. Ohio Revised Code §1501.091 and the First Amendment provide the basis of plaintiff's cause of action. *Davis v. Scherer, supra.*

As previously noted, the law in Ohio is well established that decisions to award contracts are constrained by an abuse of discretion standard. The law is also well established that the state may not deprive a person of a property interest on the basis of political affiliation. *Elrod, supra; Branti v. Finkel,* 445 U.S. 507 (1980). It was not as well-settled but still sufficiently established as a matter of law that bidders on state contracts can state a property and due process interest in a contract that was not awarded to them. *Three Rivers, supra.* Therefore, this Court finds that the named defendants are not entitled to qualified good faith immunity.

In conclusion, Defendant James' motion to dismiss is GRANTED in its entirety.

Defendants Celeste, Shoemaker, Napier and Olson's motions to dismiss are DENIED with respect to plaintiff's claims under 42 U.S.C. §1983 but are GRANTED with respect to plaintiff's claims arising directly under the First Amendment and those alleged under 42 U.S.C. §§1981, 1985 and 1986.

This Court's prior orders staying discovery are hereby vacated.

It is so ORDERED.

/s/ James L. Graham
JAMES L. GRAHAM
United States District Judge

Before MERRITT, KRUPANSKY and RYAN, Circuit Judges.

MERRITT, Circuit Judge.

Plaintiff Steven Lundblad filed two actions pursuant to 42 U.S.C. §1983 against the Ohio Department of Natural Resources ("ODNR") and various Ohio state officials in their individual capacities. The defendants moved to dismiss Lundblad's actions, now consolidated, pursuant to Fed.R.Civ.P. 12(b)(6). The district court denied the motions of all the defendants except that of Ronald James, holding that Lundblad stated a claim under the due process clause of the fourteenth amendment, the first amendment, and the equal protection clause of the fourteenth amendment of the United States Constitution. In granting James' motion to dismiss, the district court held that Lundblad's action against him was barred by the statute of limitations. Defendants now appeal the district court's order denying their motion to dismiss and Lundblad cross-appeals the district court's order imposing sanctions against both plaintiffs and defendants pursuant to Fed.R.Civ.P. 11. We affirm the district court's order denying defendant's motion to dismiss insofar as it held that Lundblad stated a cause of action under the equal protection clause of the fourteenth amendment. We reverse, however, the district court's order insofar as it held that Lundblad stated a claim under the first amendment and the due process clause of the fourteenth amendment. We affirm the district court's dismissal of Lundblad's claim against James. Finally, we decline to address the Rule 11 sanctions issue as it is not properly before the court.

I.

A.

In May of 1983, Lundblad filed suit against four of the current defendants, Ohio Governor Richard Celeste, Myrl Shoemaker, Lieutenant Governor of Ohio and Director of ODNR,[1] William Napier, Deputy Director of ODNR, and Donald Olson, Division Chief of ODNR, and ODNR itself. Plaintiff brought his claim under 42 U.S.C. §1983, alleging that defendants violated his constitutional rights under the due process clause of the fourteenth amendment, the first amendment, and the equal protection clause of the fourteenth amendment by refusing to accept his bid for a contract to operate a golf course located in a state park. On April 14, 1986, a month short of three years after filing his original action, Lundblad filed a complaint against defendant James, Deputy Director of Resource Management for ODNR, alleging that James had been an active participant with the other defendants in the denial of Lundblad's constitutional rights. On July 5, 1983, ODNR and the other individual defendants in the original action moved for summary judgment on the ground that Lundblad's claims against all of the defendants were barred by the doctrine of *res judicata* as the result of a judgment rendered by an Ohio Common Pleas Court on April 20, 1983. ODNR also moved that Lundblad's claim against it be dismissed on

[1] After the death of Lieutenant Governor Shoemaker in 1985, the district court, upon motion by the plaintiff, substituted Dorothy Shoemaker, the late Lieutenant Governor's widow and the executrix of his estate, as a party to this action.

eleventh amendment grounds. On June 25, 1984, the district court held that the individual defendants had valid *res judicata* defenses and ODNR was protected by the eleventh amendment from an award of monetary damages. Lundblad appealed. On August 22, 1985, this court decided that the defendants' *res judicata* defense was not valid, reversed the decision of the district court with respect to the individual defendants and remanded the case back to the district court for further proceedings. 772 F.2d 907 (6th Cir.1985). Plaintiff did not appeal the dismissal of ODNR on eleventh amendment grounds, so ODNR is no longer a party to this action.

Thereafter, defendants renewed their motion to dismiss on the ground that, as state government officials, they were entitled to qualified immunity from civil damages. Meanwhile, plaintiff had filed his complaint against defendant James and on June 11, 1986, the district court granted a motion to consolidate the action against James with the original action against the other defendants. Defendant James, in addition to joining in the motion of the other defendants to dismiss on immunity grounds, also asserted that Lundblad's complaint against him was barred by the statute of limitations. The district court denied the defendants' motion and held that Lundblad had stated valid claims under 42 U.S.C. §1983 pursuant to the due process clause of the fourteenth amendment, the first amendment, and the equal protection clause of the fourteenth amendment. However, the court granted the motion to dismiss with respect to defendant James and held that plaintiff's claims against him were barred by the statute of limitations. The defendants, with the exception of defendant James, now appeal the district court's

denial of their claim of qualified immunity.[2] Lundblad has filed a cross-appeal of the district court's dismissal of defendant James and of an earlier district court order granting sanctions against his counsel.

B.

Because this case comes before this court on a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6), the court must accept as true, for purposes of this appeal, all of Lundblad's well-pleaded allegations. *Ana Leon T.V. Federal Reserve Bank of Chicago*, 823 F.2d 928, 930 (6th Cir.), *cert. denied*, ___ U.S. ___, 108 S.Ct. 333, 98 L.Ed.2d 360 (1987). Lundblad alleged that he operated the golf concession at Punderson State Park in Geauga County, Ohio from 1973 to 1982. Under Ohio state law, ODNR is permitted to operate public service facilities such as golf courses located in state parks with its own employees or by entering into contracts or leases for the operation of such facilities by private parties. O.R.C. §§1501.07, 1501.09 (Supp.1987). Although Lundblad had done an excellent job during his nine years as operator of the golf course, ODNR decided to invite bids for a contract to operate the golf course during the 1983 season. ODNR thereafter sent an "Instruction to Bidders" ("ITB")

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[2] Defendants filed their appeal pursuant to the Supreme Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817, 86 L.Ed.2d 411 (1985), in which the Court held that a "district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. §1291 notwithstanding the absence of a final judgment."

to prospective bidders, including Lundblad. ODNR received four bids on the contact.

Lundblad alleged that internal ODNR evaluations reached the conclusion that the bid submitted by plaintiff was the best bid received. Nevertheless, on April 1, 1983, ODNR announced that it had accepted the bid submitted by Robert Grant. Plaintiff alleged that defendant Shoemaker, as Director of ODNR, awarded the contract to Grant solely on the ground that Lundblad was not a Democrat. He further alleged that the decision not to grant the contract to Lundblad was part of a broader conspiracy involving all of the defendants to award contracts only to democrats and to completely exclude all bidders who are not Democrats.

On April 3, 1983, Lundblad filed suit in the Court of Common Pleas of Franklin County, Ohio for injunctive relief against the award of the contract to anyone but himself. He obtained a temporary restraining order from that court enjoining the award of the contract to Grant. On April 16, 1983, before the state court had a chance to examine Lundblad's claims on the merits, Robert Grant wrote a letter to defendant Shoemaker withdrawing his bid and requesting the return of his bid bond. On April 18, 1983, defendant Shoemaker accepted Grant's withdrawal and returned to Grant his bid bond. Thereafter, defendant Shoemaker decided to reject all of the bids and to operate the golf course with ODNR employees pursuant to the statutory authority granted by O.R.C. §1501.09.

II.

It is now firmly established that some government officials in the course of performing official duties are entitled to a qualified immunity from suit for civil damages. The Supreme Court set out the standard for applying this qualified immunity in *Harlow v. Fitzgerald*:

> [G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly established statutory or constitutional rights* of which a reasonable person would have know.
>
> * * *
>
> If the law *at that time* was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to know that the law forbade conduct not previously identified as unlawful.

457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982) (emphasis added).

Thus, under *Harlow*, Lundblad must allege facts which, if proven, "clearly establish" a violation of his constitutional rights.[3] Plaintiff has alleged violations of

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[3] Lundblad argues that defendants may not raise the qualified immunity defense because it "is an affirmative defense that must be pleaded by a defendant official." *Harlow*, 457 U.S. at 815, 102 S.Ct. at 2737. Lundblad reasons that because defendants have not filed an answer and instead raise the qualified immunity defense on a motion to dismiss for failure to state a claim, defendants should be precluded from raising the defense prior to filing an answer. While Lundblad correctly

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his constitutional rights under the due process clause of the fourteenth amendment, the first amendment, and the equal protection clause of the fourteenth amendment. Each of these must be examined in turn to determine whether they constitute allegations that defendants violated Lundblad's "clearly established" constitutional rights.

A.

Equal Protection

Lundblad argues, and the district court held, that defendants' alleged action constituted a violation of the equal protection clause of the fourteenth amendment thereby establishing a cause of action under §1983. The essence of this equal protection claim is that the incumbent Democratic administration of the State of Ohio had a rule against hiring Republicans, albeit informal and exercised in a capricious manner. In applying this rule, Lundblad contends, the administration discriminated against him by depriving him of the contract to run the golf course solely because he was a Republican.

(Continued from previous page)

states the rule, courts generally permit affirmative defenses to be asserted by motion. Wright & Miller, *Federal Practice and Procedure* §1277 (1969). The Sixth Circuit has adopted this view, and extended it to hold that "an affirmative defense is not waived, even though not specifically pleaded, where the defense clearly appears on the face of the pleading and is raised in a motion to dismiss." *Pierce v. County of Oakland*, 652 F.2d 671, 672 (6th Cir.1981).

The equal protection clause provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is in essence, "a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985).

If, as Lundblad alleges, he was denied the contract solely on the basis that he was a Republican, he was not treated the same as those with whom he is similarly situated, *i.e.*, otherwise qualified applicants who sought the contract to run the golf course. There is no rational basis for a rule which allows a state to contract with only Democrats or only Republicans. Indeed, this court and the Ohio Supreme Court have held that discrimination by a state or its agent for political reasons violates the equal protection clause. *See Glicker v. Michigan Liquor Control Commission*, 160 F.2d 96 (6th Cir.1947) (discrimination, for political reasons, by a state or its agent in the revocation of a liquor license violates the equal protection clause of the fourteenth amendment); *State ex rel. United District Heating, Inc. v. State Office Building Commission*, 124 Ohio St. 413, 179 N.E. 138 (1931) (denial of public contract to lowest bidder on sole ground that bidder does not employ union labor violates equal protection clause).

Moreover, the state's argument, citing *Palmer v. Thompson*, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971), that no matter what the motives of the state officials, the state's decision to run the course itself resulted in no actual discrimination against Lundblad and hence no violation of equal protection, is not persuasive. First, as Lundblad asserts, that decision was nothing more than an indirect way of obtaining the same result – rendering

plaintiff ineligible to operate the golf course because of his political party affiliation.

Second, the motive discussed in *Palmer* was that of legislative officials. The cases make a clear distinction between the motives of a legislative body and the motives of other actors. With respect to *legislators*, it has been said that a finding of unconstitutionality may not be grounded solely on the basis of motive. *See* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1505 (1970). This preclusion is justified by separation of powers principles and by the difficulty of determining the dominant motives underlying legislation, given the fact that many legislators with many different motives on a measure. Courts are not precluded, however, from inspecting the motives of nonlegislators. If courts were so precluded, wrongs such as racial and sexual discrimination in employment and in other areas could not be corrected. Indeed, motive and intent are the keystone of equal protection analysis. *See Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) (discriminatory intent required).

We hold, therefore, that Lundblad has stated a cause of action under §1983 for violation of his rights under the equal protection clause of the fourteenth amendment.

B.

First Amendment

Lundblad argues, and the district court held, that defendants' alleged actions in this case also violated Lundblad's first amendment free speech rights. Both

plaintiff and the district court cited the Supreme Court's decisions in *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), and *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). *Branti* and *Elrod* both involved state employees who were dismissed from their jobs solely because of their political affiliation. In particular, the district court relied upon rather expansive language in the plurality opinion of Justice Brennan in *Elrod* to the effect that whenever the government treats a Democrat one way and a Republican another it has violated the first amendment. However, the concurring opinion of Justice Stewart, which provided the majority votes to the plurality, limited the Court's holding to the proposition that "a nonpolicymaking, nonconfidential government employee can[not] be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs." *Id.* at 375, 96 S.Ct. at 2690 (Stewart, J., concurring).[4] Thus, the question presented here is whether the Supreme Court's holdings in *Branti* and *Elrod* should be extended to cases where public officials refuse to grant public contracts to the lowest bidder solely on the ground of political affiliation.

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[4] "When a fragmented Court decides a case and no single rationale explaining the results enjoys the assent of five justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .' " *Marks v. United States*, 430 U.S. 188, 1983, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 2923 n. 15, 49 L.Ed.2d 859 (1976)) (opinion of Stewart, Powell, and Stevens, JJ.).

In this case, it is not necessary to address this question directly because it was not "clearly established" in 1983 that *Elrod* and *Branti* extended to situations involving the letting of public contracts. Although the Sixth Circuit had not addressed the issue, two Eighth Circuit decisions prior to 1983 refused to apply *Elrod* and *Branti* to decisions to fire independent contractors. In *Sweeney v. Bond*, 669 F.2d 542, 545 (8th Cir.), *cert. denied*, 459 U.S. 878, 103 S.Ct. 174, 74 L.Ed.2d 143 (1982), the court held that a politically motivated dismissal of Missouri Department of Revenue fee agents, whom the court found to be independent contractors, did not violate the first amendment. Similarly, the Eight Circuit had held that the politically motivated dismissal of a public accounting firm from its position as city auditor did not contravene the first amendment because the accounting firm was an independent contractor. *Fox & Co. v. Schoemehl*, 671 F.2d 303, 305 (8th Cir.1982).

Given the fact that the only relevant case law existing in 1983 refused to extend the *Elrod* and *Branti* holdings to independent contractors, it cannot fairly be said that it was "clearly established" that the refusal of pubic officials to grant a public contract to the lowest bidder solely because of political affiliation violated Lundblad's first amendment rights. We emphasize that we do not reach the underlying issue of whether *Elrod* and *Branti* should be extended to situations involving independent contractors. We merely hold that no such extension was "clearly established" in 1983 and that defendants are, therefore, entitled to qualified immunity from civil damages for first amendment violations under §1983 as interpreted by *Harlow*.

C.

Procedural Due Process

The district court found that Lundblad had a property interest protected by the due process clause of the fourteenth amendment in having his bid evaluated in a fair, nonarbitrary fashion. The district court further found, however, that since Lundblad alleged that this property interest was deprived pursuant to an established policy rather than a random and unauthorized act, he need not plead the inadequacy of state post-deprivation remedies. *See Spruytte v. Walters*, 753 F.2d 498, 509 (6th Cir.1985), *cert. denied*, 474 U.S. 1054, 106 S.Ct. 788, 88 L.Ed.2d 767 (1986) (quoting *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984)).

Assuming, without deciding, that Lundblad held a property interest in the fair and non-arbitrary evaluation of his bid, his procedural due process claim must fail because he has adequate post-deprivation remedies available under Ohio law. *See Dayton ex rel. Scandrick v. McGee*, 67 Ohio St.2d 356, 423 N.E.2d 1095 (1981) (permanent injunction prohibiting entry into contract with arbitrarily favored bidder); *State ex rel. United District Heating, Inc. v. State Office Bldg. Comm.*, 124 Ohio St. 413, 179 N.E. 138 (1931), *aff'd on rehearing*, 125 Ohio St. 301, 181 N.E. 129 (1932) (writ of mandamus compelling award to lowest bidder). Plaintiff has no federal cause of action against defendants on procedural due process grounds because Ohio judicial remedies are perfectly adequate and provide all the process that is due.

Spruytte does not relieve Lundblad of the obligation to avail himself of these remedies. The "established state

procedure" referred to in *Hudson* and in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), has no application here. In *Logan*, the law did not allow any post-deprivation *judicial* remedy. Indeed, it was the remedy itself which was being challenged. That is not the case here. The scheme allegedly established in favor of the Democrats did not involve the Ohio courts. Indeed, there is no claim that the Ohio courts participated with the executive branch to refuse contracts to Republicans. Thus, the Ohio courts provide fair and nonarbitrary means of obtaining a remedy, and so provide due process. There is no showing that Ohio courts will deny Lundblad a remedy if he can prove his claim of discrimination based on party affiliation. Thus his procedural due process claim must fail.

We, therefore, hold that Lundblad has failed to state a cause of action under §1983 for violation of his rights under the due process clause of the fourteenth amendment.

III.

Plaintiff filed a cross-appeal arguing that the district court erred in holding that plaintiff's claims against defendant James are barred by the statute of limitations. As an initial matter, defendants argue that this court does not have jurisdiction to hear plaintiff's cross-appeal because Fed.R.Civ.P. 54(b) requires that an order dismissing less than all of the parties may not be appealed on an interlocutory basis unless the district court makes an

express determination that no just reason exists for delaying appeal. The district court made no such determination here. Nevertheless, defendants' jurisdictional arguments must be rejected because plaintiff's claim against James was originally a separate action from the claims against the other defendants. To borrow the language of *Kraft, Inc. v. Local Union, 327*, 683 F.2d 131, 133 (6th Cir.1982), "[I]nasmuch as the consolidation of both actions below did not merge the suits into a single cause, it is beyond preadventure that the trial court's decision dismissing [James] and thereby terminating [Lundblad's] action is a final appealable order not requiring further certification pursuant to Fed.R.Civ.P. 54(b)."

Turning to the merits, in *Mulligan v. Hazard*, 777 F.2d 340 (6th Cir.1985), *cert. denied*, 476 U.S. 1174, 106 S.Ct. 2902, 90 L.Ed.2d 988 (1986), this court held that the one-year statute of limitations found in O.R.C. §2305.11 governs all §1983 actions arising in Ohio. *Id.* at 344. However, the Supreme Court's recent decision in *Owens v. Okure*, ___ U.S. ___, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989), effectively overruled our holding in *Mulligan*. In *Owens*, the Supreme Court concluded that when a state has both a statute of limitations for intentional torts and a statute of limitations for residual personal injuries, "courts considering §1983 claims should borrow the general or residual statute for personal injury actions." *Id.* at ___, 109 S.Ct. at 574. Thus, the correct limitation period for §1983 actions arising in Ohio is the two-year period found in O.R.C. §2305.10 which governs "action[s] for bodily injury or injuring personal property. . . . "

This change does not help plaintiff because he did not file the claim against James until over three years

after the cause of action accrued. Nevertheless, plaintiff argues that the statute should be tolled because he did not become aware of James' participation in the decision not to grant him the contract to run the golf course until February 1986, and that James, along with the other defendants, fraudulently concealed James' participation.

"In actions brought under section 1983, state tolling statutes apply where the most nearly analogous state statute of limitations is borrowed, to the extent that the tolling provisions are not inconsistent with the federal policy underlying section 1983." *Jones v. Shankland*, 800 F.2d 77, 80 (6th Cir.1986), *cert. denied*, 481 U.S. 1048, 107 S.Ct. 2177, 95 L.Ed.2d 834 (1987) (citing *Board of Regents of the University of the State of New York v. Tomanio*, 446 U.S. 478, 484-85, 100 S.Ct. 1790, 1795, 64 L.Ed.2d 440 (1980)). We must therefore examine plaintiff's argument that the statute was tolled under the guidelines of Ohio law.[5]

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[5] The district court relied upon this court's decision in *Silverberg v. Thomson McKinnon Securities, Inc.*, 787 F.2d 1079, 1082 (6th Cir.1986), to the effect that "federal law, not state law, governs such matters as accrual of causes of action and tolling." We need not resolve the apparent conflict between *Jones* and *Silverberg* because the statute of limitations governing Lundblad's claim against James was not tolled under either the federal or state tolling rules. Assuming federal rules apply, the district court correctly held that our decision in *Diminnie v. United States*, 728 F.2d 301 (6th Cir.)., *cert. denied*, 469 U.S. 842, 105 S.Ct. 146, 83 L.Ed.2d 85 (1984), would preclude tolling in this case under federal law because James did not actively and personally participate in any fraud on Lundblad to conceal his role in the decision to deny plaintiff the golf course management contract.

Lundblad makes three arguments under Ohio law in support of tolling the statute of limitations on his claim against James. We take up each in turn.

First, he argues that failure to apply the toll in this case would violate his right to a remedy under Article I, Section 16 of the Ohio Constitution. Lundblad cites *Hardy v. Vermeulen*, 32 Ohio St.3d 45, 47, 512 N.E.2d 626, 629 (1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1029, 98 L.Ed.2d 993 (1988), for the proposition that a statute of limitations "as applied to bar the claims of medical malpractice plaintiffs who did not know or could not reasonably have known of their injuries, violates the right-to-a-remedy provision of Section 16, Article I of the Ohio constitution." However, *Hardy* applies only where a prospective plaintiff is not aware or could not be aware of his *injuries*. It does not apply to cases where a prospective plaintiff is unaware that an additional defendant may exist for a known cause of action. There is no support in Ohio law for the proposition that a statute of limitations will be tolled until plaintiff learns the identity of a prospective defendant. In this case, Lundblad knew of the injury at the time of its occurrence, and the statute of limitations afforded him a reasonable time in which to enforce his claim. Lundblad's argument that *Hardy* tolled the statute of limitations therefore fails.

Second, Lundblad argues that application of the time limitation to this case would be retroactive and thus would violate his right to a remedy under the Ohio Constitution. *Deskins v. Young*, 26 Ohio St.3d 8, 496 N.E.2d 897 (1986). Lundblad reasons that the Supreme Court's decision in *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), overturned long-established law

that federal courts were required to use the most analogous statute of limitations. Lundblad further argues that the most analogous statute of limitations at the time *Wilson* was decided was O.R.C. §2305.09(C) which provides for a four-year limitation period in cases seeking relief for fraud.

Plaintiff's argument must fail for two reasons. First, *Deskins*, like *Hardy*, involved a case where the *injury*, not the identity of a defendant, could not have been discovered prior to the running of the statute. The retroactive application of a shorter statute of limitations "is not unlawful as long as a prospective claimant is still afforded a reasonable time in which to enforce his right." *Mominee v. Scherbarth*, 28 Ohio St.3d 270, 278, 503 N.E.2d 717, 723 (1986) (quoting *Baird v. Loeffler*, 69 Ohio St.2d 533, 535, 433 N.E.2d 194, 196 (1982)). Second, and more importantly, this court has already expressly considered and rejected this argument. In *Mulligan*, the court held that "*Wilson* implicitly mandates that its holding be applied retroactively." 777 F.2d at 344. Although *Mulligan* no longer controls the question of which statute of limitations applies, it remains the law of the circuit with respect to the question of retroactivity.

Finally, Lundblad argues that the statute of limitations is tolled with respect to his claim against defendant James under the Ohio doctrine of fraudulent concealment. The facts of this case do not support a finding of fraudulent concealment because plaintiff has not alleged that defendant James personally took any fraudulent actions to conceal his involvement in the decision not to grant Lundblad the golf course contract. At most, plaintiff alleged that he was prevented from discovering

defendant James' participation in the denial of his bid as a result of deceptive replies by ODNR to his discovery requests, the original defendants' securing of protective orders in both state and federal court, and the filing of a fraudulent affidavit by defendant Shoemaker's physician which prevented plaintiff from deposing him. None of these allegedly deceptive practices involved James.

We hold that the statute of limitations governing Lundblad's claim against James was not tolled and that, because Lundblad did not initiate any action on that claim during the two-year period, the district court was correct in dismissing it.

IV.

Plaintiff also appeals the district court's order imposing Rule 11 sanctions on counsel for both plaintiff and defendants. We decline to address this question because the Rule 11 sanctions are in no way related to the issues of qualified immunity made appealable by *Mitchell v. Forsyth*, 472 U.S. at 530, 105 S.Ct. at 2817. *See* note 2 *supra*. The district court did not make "an express determination that there is no just reason for delay . . . ," Fed.R.Civ.P. 54(b). We therefore lack jurisdiction to review this question on an interlocutory appeal. The Ninth Circuit opinion in *Unioil, Inc. v. E.F. Hutton & Co., Inc.*, 809 F.2d 548, 556 (9th Cir.1986), cited by the dissenting judge, might provide persuasive authority for a contrary ruling if the lawyer for Lundblad had in fact appealed as did the lawyer, Alioto, in *Unioil*. The lawyer here, however, has not filed a notice of appeal from the order imposing the Rule 11 sanctions, as did Alioto, and

therefore the lawyer has no standing in our court to argue that the order imposing Rule 11 sanctions against him is final. *Unioil* does not hold – and our research does not disclose that any court has held – that an interlocutory appeal by a party becomes final because the party is appealing Rule 11 sanctions.

V.

We conclude that Lundblad's equal protection claim is his only viable §1983 claim and that his claim against James is foreclosed. The judgment of the district court is AFFIRMED in part and REVERSED in part, and the case is REMANDED for further proceedings not inconsistent with this opinion.

RYAN, Circuit Judge, concurring in part and dissenting in part:

Because my brother correctly resolves the questions presented by plaintiff's first amendment claim and his claim against defendant James, I join parts I, II-B, and III of the court's opinion. However, I must respectfully dissent from my brother's treatment of the plaintiff's equal protection claim, his procedural due process claim, and the trial court's imposition of sanctions against plaintiff's counsel.

I.

The court concludes that plaintiff has stated a claim under 42 U.S.C. §1983 for violation of his rights under the equal protection clause of the fourteenth amendment because he has alleged that defendants denied him the

golf course contract solely because he was not a Democrat. The court is not troubled by the defendants' subsequent decision to run the gold course themselves pursuant to O.R.C. §1501.29 (1986). Were we writing on a clean slate, I might agree with my brother's reasoning and conclusion. Unfortunately, however, the Supreme Court's decision in *Palmer v. Thompson*, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971) precludes that result.

In *Palmer*, plaintiffs brought an equal protection claim against the city of Jackson, Mississippi after city officials had closed the public swimming pool rather than desegregate it. The Court refused to find an equal protection violation because the decision treated blacks and whites identically: neither could use the pool *Id.* at 220, 91 S.Ct. at 1942. In this case, defendants' decision similarly treats Democrats and Republicans identically: neither may operate the golf course.

My brother offers two reasons for ignoring *Palmer*. First, he argues that the decision of defendants to operate the golf course themselves "was nothing more than an indirect way of obtaining the same result – rendering plaintiff ineligible to operate the gold course because of his political affiliation." That may very well be so. But the decision at issue in *Palmer* was also unquestionably an indirect way of obtaining the same result – keeping blacks out of public pools in Jackson. Counsel for the city conceded at oral argument "that the desegregation ruling . . . precipitated the city's decision to cease furnishing public swimming facilities to its citizens." *Id.* at 254. 91 S.Ct. at 1959 (White, J., dissenting). Thus, there is no distinction on this point between the case at bar and *Palmer*.

We also told that this case is distinct from *Palmer* in that the decision there was taken by a legislative body whereas the decision at issue here was taken by executive officials. My brother cites no authority for the proposition that *Palmer* applies only to statutes and not executive actions, and I could find none. Instead, the court explains that the judiciary may not be precluded from inspecting the motives of non-legislators. This, of course, is true. But it does not change the fact that executive officials may not be held liable under the equal protection clause unless they actually discriminate against a protected group. *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), does not stand for the proposition that discriminatory intent, without discriminatory action, establishes a violation of the equal protection clause; rather, it holds that *both* are required. *Id.* at 239, 96 S.Ct. at 2047.

Defendants' actions in this case may very well have been designed to keep Republicans out of the state's golf course business. But these actions *did* treat Democrats and Republicans alike. While I sympathize with my brother's desire to preclude conduct of the sort alleged here, this court lacks the authority to reach that conclusion. We must respect the Supreme Court's determination, right or wrong, in *Palmer*.

II.

I also disagree with the court's conclusion that plaintiff does not state a claim for violation of his rights under the due process clause. The court holds that the availability of adequate post-deprivation remedies under Ohio

law precludes plaintiff's due process claim. This reasoning ignores the well established principle that the requirement that a plaintiff seek post-deprivation remedies *"is inapplicable* when 'a deprivation of property is caused by conduct pursuant to established state procedure, rather than random and unauthorized action.' " *Spruytte v. Walters,* 753 F.2d 498, 509 (6th Cir.1985), *cert. denied,* 474 U.S. 1054, 106 S.Ct. 788, 88 L.Ed.2d 767 (1986) (quoting *Hudson v. Palmer,* 468 U.S. 517, 532, 104 S.Ct. 3194, 3203, 82 L.Ed.2d 393 (1984)) (emphasis added).

The court attempts to avoid *Spruytte* by pointing out that the law at issue in *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), a case upon which the *Spruytte* court relied, did not provide for a post-deprivation judicial remedy. This observation, while interesting, is completely irrelevant to the issue presented by this appeal. The fact remains that the *Spruytte* court squarely held that "the adequacy of state post-deprivation procedures is irrelevant" when plaintiff has alleged a violation of his rights pursuant to established state procedure. 753 F.2d at 510.

Because plaintiff did allege that defendants' actions were part of a broader scheme to ensure that only Democrats received state contracts, and because I agree with the district court's holding that Ohio law grants plaintiff a property interest in the fair and non-arbitrary evaluation of his bid, *see Dayton ex rel. Scandrick v. McGee,* 67 Ohio St.2d 356, 423 N.E.2d 1095 (1981); *State ex rel. United District Heating, Inc. v. State Office Bldg. Commission,* 124 Ohio St. 413, 179 N.E. 138 (1931), *aff'd on reh.,* 125 Ohio St. 301, 181 N.E. 129 (1932), I would affirm the district

court's denial of defendants' motion to dismiss plaintiff's procedural due process claim.

III.

Finally, I must dissent from the court's refusal to consider the appeal of the district court's imposition of sanctions. My brother declines to reach the issue because it is not "related to the issues of qualified immunity made appealable by *Mitchell v. Forsythe*, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817, 86 L.Ed.2d 411 (1985)." I disagree with this holding, and would instead adopt the position taken by the Ninth Circuit:

> An order imposing sanctions solely upon counsel, a non-party to the underlying action, is immediately appealable as a final order. *Optyl Eyewear Fashion International Corp. v. Style Companies, Ltd.*, 760 F.2d 1045, 1047 n. 1 (9th Cir. 1985); *Kordich v. Marine Clerks Association*, 715 F.2d 1392, 1393 (9th Cir.1983).

Unioil, Inc. v. E.F. Hutton & Co., Inc., 809 F.2d 548, 556 (9th Cir.1986).

Under this rule, it does not matter whether the issues presented by the sanctions order relate to those of qualified immunity because the sanctions order is itself a final, appealable order under 28 U.S.C. §1295.

IV.

For the reasons set forth above, I concur with parts I, II-B, and III of the court's opinion, and dissent from parts II-A, II-C, and IV.

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 87-3651/3689

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

STEVEN LUNDBLAD, *Plaintiff-Appellee, Cross-Appellant,*	)	
v.	)	ON APPEAL from the United States District Court for the Southern District of Ohio
RICHARD F. CELESTE, DOROTHY SHOEMAKER, WILLIAM NAPIER and DONALD OLSON, in their official capacities,	)	
Defendants-Appellants, Cross-Appellees,	)	
OHIO DEPARTMENT OF NATURAL RESOURCES, RONALD JAMES, Deputy Director,	)	
Defendants.	)	

Decided and Filed January 31, 1991

Before: MERRITT, Chief Judge; KEITH, KENNEDY, MARTIN, JONES, KRUPANSKY, MILBURN, GUY, NELSON, RYAN, BOGGS, NORRIS and SUHRHEINRICH, Circuit Judges; and WELLFORD*, Senior Circuit Judge.

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*The Honorable Harry W. Wellford assumed senior status January 21, 1991.

MERRITT, C.J., delivered the opinion of the court in which KEITH, KENNEDY, MARTIN, JONES, KRUPANSKY, MILBURN, GUY, NELSON, BOGGS, NORRIS, and SUHRHEINRICH, JJ., and WELLFORD, S.J., joined. RYAN, J., (p. 5), delivered a separate opinion concurring in part and dissenting in part, in which, WILLFORD, S.J., joined as to part II-C.

MERRITT, Chief Judge. The Court, having granted rehearing and sitting en banc, has reconsidered and now modified Part II A of the opinion heretofore published in this case, *Lundblad v. Celeste*, 874 F.2d 1097, 1100-01 (1989). In that Part of the opinion, the panel decision held that the defendant public officials were not entitled to a qualified immunity from damages under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), insofar as the complaint alleged that the defendants deprived plaintiff of equal protection by causing the State of Ohio on partisan political grounds to refuse to award plaintiff a bid to operate a golf course at a state park. We now hold that under the doctrine of qualified immunity the defendant officials are shielded from the payment of civil damages on plaintiff's equal protection claim. We therefore reinstate the opinion heretofore filed, except for Part II A which we vacate and Part V which we modify by reversing the District Court's judgment on the plaintiff's equal protection claim.

The doctrine of qualified immunity, as defined in *Harlow, supra* at 818, shields officials "from liability for civil damages insofar as their conduct does not violate *clearly established statutory or constitutional rights* of which a reasonable person would have known." (Emphasis added.) The basic reason for the principle is that "an official could not reasonably be expected to anticipate

subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Id.*

We conclude that no legal principles developed under the *Equal Protection Clause* "clearly establish" that state officials may not award public contracts on the basis of partisan politics or party affiliation. In *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729 (1990), *Branti v. Finkel*, 445 U.S. 507 (1980), and *Elrod v. Burns*, 427 U.S. 347 (1976), the Supreme Court has developed principles under the *First Amendment* prohibiting the hiring and firing of employees on a partisan political basis, but the Court has not developed such principles under the Equal Protection Clause, nor has it extended these First Amendment principles to the area of public contracts. It has not decided a case holding that the award of public contracts on the basis of political patronage violates either equal protection or the First Amendment. Thus there is no law developed in the Supreme Court that could be said to "clearly establish" the principle of equal protection proposed by the plaintiff in this case.

The only case we have found from this Court that could be argued "to clearly establish" such a proposition under equal protection is *Glicker v. Michigan Liquor Control Comm'n*, 160 F.2d 96 (1947), the case relied on in our previous panel decision in this case. In *Glicker*, we held, in reviewing a motion to dismiss for failure to state a claim, that state revocation of an existing state liquor license for partisan political reasons may violate equal protection. The case does not rule on whether the refusal to award a public contract for similar reasons would constitute a violation, and we have discovered no case in this or

another court of appeals holding that awards of public contracts on a partisan political basis violates the Equal Protection Clause. In the absence of such authority, a public official could not "know that the law forbade [such] conduct." Thus the law was not clearly established on the issue, and the doctrine of official immunity shields the defendants from civil damages.

Accordingly, the opinion of the Court in *Lundblad v. Celeste* is reinstated except for Part II A which is vacated and Part V which is modified so as to reverse the District court judgment denying the defendants' defense of qualified immunity on plaintiff's equal protection claim. The result of our en banc judgment, therefore, is to REVERSE the judgment of the District court with respect to plaintiff's Equal Protection, First Amendment and Due Process claims and AFFIRM the judgment of the District Court in dismissing on statute of limitations grounds the plaintiff's claim against the defendant James.

RYAN, Circuit Judge, concurring in part and dissenting in part. I concur in the court's opinion, except for parts II-C and IV of the reinstated portion of the panel opinion. As to those parts, I dissent for the reasons stated in my dissenting opinion in *Lundblad v. Celeste*, 874 F.2d 1097, 1100 (6th Cir. 1989).

Supreme Court, U.S.
FILED
JUN 6 1991
OFFICE OF THE CLERK

(2)

No. 90-1594

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

STEVEN LUNDBLAD,

Petitioner,

v.

RICHARD F. CELESTE; DOROTHY SHOEMAKER; WILLIAM NAPIER; and DONALD OLSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

LEE FISHER
ATTORNEY GENERAL OF OHIO

By: **E. DENNIS MUCHNICKI**
Assistant Attorney General
Environmental Enforcement
30 East Broad Street, 25th Fl.
Columbus, Ohio 43266-0410
(614) 466-2766
Counsel of Record for Respondents

JOAN C. WEISER
Assistant Attorney General
Co-Counsel for Respondents

QUESTIONS PRESENTED FOR REVIEW

I. Where all circuit courts which have addressed the issue have held that considerations of political patronage are permissible when state officials decide whether to award a service contract to an independent contractor, did not the court below properly recognize a qualified immunity under *Harlow v. Fitzgerald* when it ruled to dismiss an action filed by a disappointed bidder who was allegedly denied a service contract in April, 1983, on the basis of political affliation, under 42 U.S.C. §1983 et seq. and the First and Fourteenth Amendments to the Constitution.

II. Where neither a property right to the award of a service contract under state law, nor the inadequacy of state post-deprivation remedies were clearly established in April, 1983, did not the court below properly recognize a qualified immunity under *Harlow v. Fitzgerald* when it ruled to dismiss an action filed by a disappointed bidder under 42 U.S.C. §1983 et seq. and the Fourteenth Amendment to the Constitution.

PARTIES TO THE PROCEEDINGS

The parties to these proceedings are Petitioner Steven Lundblad and Respondents Richard F. Celeste, Dorothy Shoemaker, Executor of the Estate of Myrl Shoemaker, William Napier and Donald Olson. Petitioner has waived all claims earlier asserted against the State of Ohio, Department of Natural Resources and Ronald James (Petition, p. 8, fn.1).

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II. The State Officials were entitled to qualified immunity under *Harlow v. Fitzgerald* because Petitioner failed to demonstrate that he enjoyed a clearly established substantive property right under Ohio law; coupled with his inability to identify any defect in Ohio's post-deprivation remedies, the Sixth Circuit's refusal to entertain his Due Process claims was correct. 12

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Ohio Revised Code 1501.09 (Page's 1986)*:

> The public service facilities mentioned in section 1501.07 of the Revised Code may be leased by the department of natural resources for the operation thereof as provided in section 1501.10 of the Revised Code, or may be operated by any person, firm, partnership, association, or corporation under contract with the director of natural resources as provided in section 1501.091 [1501.09.1] of the Revised Code, or may be operated by the department through the division of parks and recreation.

STATEMENT OF THE CASE

A. Factual Background

In May of 1983, Petitioner filed suit in federal district court against five employees of the State of Ohio ("State Officials") seeking substantial compensatory and punitive damages against each of them personally for alleged violations of 42 U.S.C. §§ 1983 et seq. No injunctive relief was sought. Petitioner's constitutional injuries were alleged to have occurred because the State Officials decided to solicit bids for a concession operation of the Punderson State Park Golf Course in Geauga County, Ohio, and ultimately rejected all bids and self-operated the golf course.

Petitioner had operated the golf course under a bid concession contract with the State of Ohio for several years preceding the Spring, 1983 season. This contract had expired and was not subject to renewal under controlling provisions of Ohio law (O.R.C. 1501.10, Petition, p.4). In his complaint, Petitioner alleged that he submitted the "best bid" for the concession and that the tentative selection of Petitioner's

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* Ohio Revised Code 1501.09 is here set forth as it was in effect in April, 1983. It has since been amended in respects not pertinent to this litigation.

business competitor as the apparent awardee of the concession contract was based solely upon partisan politics and patronage considerations. Petitioner filed suit against the State of Ohio on April 3, 1983, in the Court of Common Pleas of Franklin County, Ohio, seeking to enjoin the State's anticipated award of the concession contract to his business competitor. Petitioner did not seek a mandatory injunction compelling the award of the contract to himself. The competitor withdrew his bid; the State rejected all other bids, including Petitioner's; and the State Officials proceeded to self-operate the golf course as was their express statutory right in accordance with O.R.C. 1501.09.

B. Proceedings Below

Petitioner filed suit in the United States District Court, Southern District of Ohio, Eastern Division in May, 1983, alleging that the State Officials had violated his rights under the First and Fourteenth Amendments by arbitrarily denying him the contract to operate the golf course.* The district court granted the State Officials' motion to dismiss on res judicata grounds (based on the judgment rendered by the Ohio court of common pleas in Petitioner's state court action). On appeal, the Court of Appeals for the Sixth Circuit reversed the res judicata decision and remanded.

Upon remand to the district court, the State Officials moved to dismiss on the grounds that in April, 1983, it was not clearly established that consideration of political affiliation was impermissibie in the selection of an independent contractor. The State Officials sought qualified immunity under this Court's ruling in *Harlow v. Fitzgerald,* 475 U.S. 800 (1982). This motion was denied. On appeal, all three members of the circuit court panel agreed with the State Officials that *Harlow* applied and that Petitioner's claim as it related to his allegation that his First Amendment rights of freedom of association should be dismissed. Two judges held that *Harlow* protected the State Officials from Petitioner's Due

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*Petitioner does not claim to be a member of any discrete and insular class customarily associated with equal protection considerations.

Process claim, but that it did not extinguish his equal protection cause of action; the dissenter held that *Harlow* did defeat Petitioner's Due Process claim but not his equal protection cause of action.

On rehearing en banc, all of the fourteen judges of the Sixth Circuit unanimously agreed that Petitioner's claims under the First Amendment and Equal Protection Clauses should be dismissed because it was not clearly established in April, 1983 that considerations of political affiliation were impermissible in the selection of an independent contractor, and *Harlow* immunity applied. Twelve of the judges agreed that the same principles defeated Petitioner's claim under the Due Process Clause, and two judges dissented from only this aspect of the ruling.

REASONS FOR DENYING THE PETITION

I. The Court of Appeals en banc ruling, which dismissed the case under *Harlow v. Fitzgerald* because it was not clearly established in April, 1983, that state officials were prohibited from refusing to award a service contract to an independent contractor on the basis of political affiliation, is consistent with all existing precedent.

In a case such as this where government employees are sued personally for monetary damages, and the plaintiff does not seek any injunctive relief, this Court has consistently recognized the chilling effect such burdensome litigation can produce upon civil servants. Thus, the Court established appropriate protection for government employees, and has declared that a need for a qualified immunity for government officials is vital to the function of government. In *Scheurer v. Rhodes,* 416 U.S. 232 (1974), the former governor of Ohio and various other state employees were sued under 42 U.S.C. § 1983 by the estates of students who were killed at Kent State. In determining that the governor was entitled to qualified immunity, the Court stated:

> Implicit in the idea that officials have some immunity - absolute or qualified - for their acts, it is recognized that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.

Id., at 242. The Court further found that public officials who failed to act or make necessary decisions due to the threat of personal liability cannot fully and faithfully perform their duties. *Id.*

The need for qualified immunity to protect officials who exercise discretionary functions was emphasized by the Court in *Wood v. Strickland,* 420 U.S. 308 (1975). In that case, several high school students who were expelled from school for serving "spiked" punch brought a 42 U.S.C. §1983 action against various school officials. In determining the scope of immunity afforded the officials, the Court looked to the potential liability of the defendants and the chilling effect refusal to grant immunity could have in school boards across the country:

> The imposition of monetary costs for mistakes which were not unreasonable in light of all the circumstances would undoubtedly deter even the most conscientious decision maker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students. The most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources for monetary liability were a likely prospect during their tenure [Footnote omitted].

Id. at 319, 320.

Finally, in *Harlow*, the Court established a clear standard for granting qualified immunity to those who exercise discretionary functions. Justice Powell, writing for the Court,

declared that:

> [W]e conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.
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> * * * * * * * *
>
> If the law at that time was not clearly established, an officials could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

Id. at 817-818.

The Petition is utterly devoid of reference to *Harlow* or discussion of its application to the case at bar. Considering that *Harlow* is the basis of the State Officials' defense to this action and the major focus of the Sixth Curcuit's decision, omission of *Harlow* is inexplicable.

Furthermore, Petitioner does not cite even one single case which holds that political affiliation is an impermissible criterion in the selection of an independent contractor, nor does Petitioner cite the well-established circuit court precedent which contradicts this proposition — precedent which the State Officials have repeatedly cited in numerous briefs and memoranda filed in the eight years of this litigation. Every circuit which has spoken on the subject has concluded that the holdings of *Elrod v. Burns,* 427 U.S. 374 (1976) and *Branti v. Finkel,* 445 U.S. 507 (1980) do not extend to the context of selection of an independent contractor, and that

refusal to contract or even termination of an existing contract on the basis of political affiliation will not support an independent contractor's pursuit of relief under 42 U.S.C. §1983. Such was the settled state of the law in April, 1983, when the State Officials made the decision which spawned this lawsuit.

In *Sweeney v. Bond,* 669 F.2d 542 (8th Cir.), *cert. denied,* 459 U.S. 878 (1982), the court allowed the Republican officials of the State of Missouri to fire Democrat internal revenue fee agents. The court upheld a district court finding that the fee agents were not public employees and concluded that they were "not protected from dismissal because of their political affiliations". *Id.* at 546. In *Fox & Co. v. Schoemel,* 671 F.2d 303 (1982), the Eighth Circuit reaffirmed the principles of *Sweeney v. Bond* and held that an accounting firm hired by the City of St. Louis, Missouri, to audit books and records did not enjoy the protection established for public employees in *Elrod* and *Branti* and could be dismissed solely because of political affiliation notwithstanding a valid contract.

On the heels of the Eight Circuit's holding in *Fox & Co.,* and just weeks after the State Officials made the decision put at issue by Petitioner, the Seventh Circuit issued its decision in *LaFalce v. Houston,* 712 F.2d 292 (7th Cir. 1983). In *LaFalce,* plaintiff submitted a bid to install and maintain benches along the streets of the City of Springfield, Illinois. Like Petitioner, plaintiff claimed his bid was most favorable to the contracting authority but was rejected solely because his competitors were political supporters of the incumbent and plaintiff was not. In rejecting plaintiff's First Amendment claim, the court refused to extend *Elrod* and *Branti* to independent contractors and declared:

> We are reluctant to tamper with political institutions when the competing First Amendment interests are as attenuated as they appear to be here.
>
> A practical consideration reinforcing our caution is that a decision upholding a First Amendment

> right to have one's bid considered without regard to political considerations would invite every disappointed bidder for a public contract to bring a federal suit against the government purchaser. Civil service laws protect many public employees from being discharged; but it is in the nature of competitive bidding that every award of a contract involves the rejection of one or more other bids, each of which could form the basis of a federal suit under the theory advanced by the plaintiff in this case.
>
> We are particularly reluctant to take so big a step in the face of the Supreme Court's apparent desire to contain the principle of *Elrod* and *Branti*. As the Eight Circuit pointed out in *Sweeney v. Bond, supra* 669 F.2d at 542, 545, the plurality opinion in *Elrod,* after noting that 'the general practice of political patronage' includes making 'nonofficerholders . . . the beneficiaries of lucrative government contracts for highway construction, buildings, and supplies,' states: 'Although political patronage comprises a broad range of activities, we are here concerned only with the constitutionality of dismissing public employees for partisan reason.' 427 U.S. at 353, 96 S.Ct. at 2680.
>
> Some day the Supreme Court may extend the principle of its public-employee cases to contractors. But there are enough differences in the strength of the competing interests in the two classes of cases to persuade us not to attempt to do so.

Id., at 294, 295.

Finally, in *Horn v. Keane,* 796 F.2d 668 (3rd Cir. 1986), the Third Circuit flatly declared that New Jersey motor vehicle agents were independent contractors who were not insulated by the First Amendment from being replaced by the governor's successor who was of a different political party.

II. The State Officials were entitled to qualified immunity under *Harlow v. Fitzgerald* because Petitioner failed to demonstrate that he enjoyed a clearly established substantive property right under Ohio law; coupled with his inability to identify any defect in Ohio's post-deprivation remedies, the Sixth Circuit's refusal to entertain his Due Process claims was correct.

The absence of any clearly established substantive right to contract for the golf course concession was fatal to Petitioner's due process claims and supported dismissal of the complaint or *Harlow* grounds. It is equally compelling that Petitioner's inability to demonstrate any fault with Ohio's post-deprivation remedies protected the State Officials from his substantive due process attack. Thus, qualified immunity under *Harlow* serves to defeat the entirety of Petitioner's due process claims.

The Sixth Circuit merely assumed, but did not decide, that Petitioner was possessed of a property interest in the evaluation of his bid. The court then reasoned that regardless of the existence of any such right, Petitioner's claim under the Due Process clause would fail "because Ohio judicial remedies are perfectly adequate and provide all the process that is due." Petition, p.A.31. The Sixth Circuit's "assumption" that Petitioner possessed a property interest under Ohio law is in conflict with its own decisions and incorrect. This disputed assumption is insufficient to support certiorari to review Petitioner's procedural Due Process contentions — which are themselves fatally flawed. However, despite the court's erroneous "assumption", it did reach the correct conclusion and did not create bad law in the process.

An examination of and the law of the Sixth Circuit and the law of Ohio relating to bidders for contracts with public authorities illustrates the flaws in the Sixth Circuit's "assumption" and Petitioner's complaint. The law in the Circuit in April, 1983, clearly indicated that a bidder possessed no constitutionally protected property interest.

The action of officials of the City of Sterling Heights, Michigan, in 1982, who rejected all bids for a landscape contract, was insufficient to establish a substantive property interest and resulted in dismissal of plaintiff's 42 U.S.C. §1983 cause of action in *Kasom v. City of Sterlilng Heights,* 600 F.Supp. 1555 (E.D.Mich.1985), *aff'd mem.* 785 F.2d 308 (6th Cir. 1986).

In *Coyne-Delaney Co. v. Capital Development Bd.,* 616 F.2d 341, (7th Cir. 1980), the Seventh Circuit rejected Plaintiff's due process and equal protection claims and approved Illinois' supply contract bidding specifications which totally excluded plaintiff from consideration. The court stated that "A bidder on a government contract has no legally enforceable right against the award of the contract to a competitor other than those the government has seen fit to confer." *Id.* at 342. Ohio has not conferred any such right upon concession bidders and indeed specifically reserved the right to self-operate. O.R.C. 1501.09, p. 1. Under *Harlow,* qualified immunity shielded the State Officials from personal liability in deciding to self-operate.

Consistent with this analysis is the holding of *Cincinnati Electronics Corp. v. Kleppe,* 509 F.2d 1080 (6th Cir. 1975), where the Sixth Circuit declared that general competitive bidding statutes do not confer property rights upon bidders for public contracts. This Court has also recognized the general proposition that, absent specific statutory provisions, general competitive bidding statutes do not confer vested rights of any kind upon bidders for public contracts. *See, e.g., Perkins v. Lukens Steel Corp.,* 309 U.S. 643 (1940). Because Petitioner's cause of action hinges upon a general competitive bidding statute which expressly authorizes self-operation and has no specific provision giving participants in the bidding process the right to seek damages as a consequence of alleged irregularities in contract award, the State Officials did not deprive Petitioner of any constitutional right in rejecting all bids and deciding to self-operate the Punderson State Park Golf Course.

A more recent Sixth Circuit decision reaffirms the principle

The court rejected claims raised under the First, Fifth and Fourteenth Amendments and also refused to extend *Elrod* and *Branti* to independent contractors. Today, none of the circuits have undertaken to extend *Elrod, Branti* or *Rutan v. Republican Party of Illinois,* 110 S.Ct. 2729 (1990), beyond public employees and into the sphere of independent contractors.

Elrod and *Branti* are the two Supreme Court cases circa 1980 in which political affiliation is addressed. Both of these cases are limited to firings of public employees, and neither encompasses independent contractors. *Sweeney v. Bond, Fox & Co. v. Schoemel, LaFalce v. Houston,* and *Horn v. Keane* are the only circuit level cases which concern independent contractors, and in every case the court declared that considerations of political affiliation are permissible in this context. Accordingly, it was not clearly established in April, 1983, that patronage considerations were improper in the selection of an independent contractor; indeed, the settled state of the law indicates that such considerations were consummately permissible then, and they continue to be permissible today. Therefore, the State Officials were well within the ambit of qualified immunity established in *Harlow,* and the Sixth Circuit's en banc holding to this effect is patently correct.

Recently, in *Rutan,* a majority of the Court extended the principles of *Elrod* and *Branti* to hirings, promotions, transfers and recall rights of public employees. The *Rutan* dissenters argued that *Elrod* and *Branti* were wrongly decided and should not be extended beyond their facts, and in support of the arguments of the dissent Justice Scalia emphatically underscored the lack of guidance the "appropriate requirement" standard established in *Branti* provided to government officials trying to avoid 42 U.S.C. §1983 liability in the years following *Branti:*

> A few examples will illustrate the shambles *Branti* has produced. A city cannot fire a deputy sheriff because of his political affiliation, but then again perhaps it can, especially if he is called the 'police

> captain.' A county cannot fire on that basis its attorney for the department of social services, nor its assistant attorney for family court, but a city can fire its solicitor and his assistants, or its assistant city attorney, or its assistant state's attorney, or its corporation counsel. A city cannot discharge its deputy court clerk for his political affiliation, but it can fire its legal assistant to the clerk on that basis. Firing a juvenile court bailiff seems impermissible, but it may be permissible if he is assigned permanently to a single judge. A city cannot fire on partisan grounds its director of roads, but it can fire the second in command of the water department. A government cannot discharge for political reasons the senior vice president of its development bank, but it can discharge the regional director of its rural housing administration.
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> The examples could be multiplied, but this summary should make obvious that the 'tests' devised to implement *Branti* have produced inconsistent and unpredictable results. That uncertainty undermines the purpose of both the nonpatronage rule and the exception. [Footnotes omitted.]

Id., at 2756-2757. Justice Scalia's observation, in 1990, of the varying interpretations given to *Elrod* and *Branti* illustrates the general confusion stimulated by patronage considerations in the context of government employees pre-*Rutan*. In the post-*Branti* decisions and in the course of the *Rutan* decision itself bitter conflict among learned jurists has resulted from efforts to apply the standard articulated in *Branti*. The very existence of such deeply divided thought and opinion in an area where the Court has spoken certainly substantiates the correctness of the Sixth Circuit's holding in an area where the Court has remained silent. The state of the law in April, 1983, called for application of *Harlow* immunity in this case because Petitioner had no clearly established constitutional right to operate the Punderson State Park Golf Course in April, 1983.

Rutan is not in conflict with the decision reached below. Indeed, citing *Elrod, Branti* and *Rutan,* the Sixth Circuit en banc in the case at bar held:

> . . . the Supreme Court has developed principles under the First Amendment prohibiting the hiring and firing of employees on a partisan political basis, but the Court has not developed such principles under the Equal Protection Clause, nor has it extended these First Amendment principles to the area of public contracts. It has not decided a case holding that the award of public contracts on the basis of political patronage violates either equal protection or the First Amendment. Thus there is no law developed in the Supreme Court that could be said to 'clearly establish' the principle of equal protection proposed by the plaintiff in this case.

(Petition, p. A.45). This holding is consistent with the unanimity among the circuits which have addressed the subject of patronage considerations in the context of independent contractors. Denial of the golf course concession contract to an independent contractor, allegedly due to patronage considerations, did not violate any clearly established constitutional rights enjoined by the Petitioner in April, 1983, when the State Officials' decision was made. Moreover, there is no substantive entitlement to contract with the State enjoyed by Petitioner to which any constitutional right could attach.

Conspicuous by its absence from Petitioner's brief is any reference to O.R.C. 1501.09,* which expressly authorizes the Ohio Department of Natural Resources to lease, contract, or self-operate facilities such as the Punderson State Park Golf Course. None of the Ohio Revised Code statutes in any way limit the ability of the Ohio Department of Natural

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*O.R.C. 1501.09, as in effect in 1983, appears at P.1 of this brief. Later amendments to this statute are omitted.

Resources to reject all bids, nor do any of these statutes require a contract in lieu of self-operation. The Ohio laws establish that contracting for concession operation of public service facilities is permissive, not mandatory.

This particular case for which Petitioner now seeks review is singularly ill-suited to the task of extending the holdings of *Elrod, Branti* or *Rutan* to the context of independent contractors. Primarily this is because it was not necessary for the lower courts to reach or rule upon the issue of whether political affiliation is a permissible criterion in selection of independent contractors; instead, the task of the lower courts was to decide whether the State Officials would be personally liable for monetary damages for a decision made in April, 1983, concerning operation of the Punderson State Park Golf Course. Accordingly, the Sixth Circuit en banc properly confined its review to this question: whether the State Officials, in making the decision to self-operate the golf course in April, 1983, violated any clearly established statutory or constitutional right enjoyed by Petitioner; or whether they were entitled to the qualified immunity established in *Harlow v. Fitzgerald*. The Sixth Circuit expressed no opinion on whether considerations of political affiliation are constitutionally permissible in selecting an independent contractor; instead, it properly confined its holding to the narrow question framed by Petitioner at the early stages of this litigation.

The appellate court's decision was complete and adequate, and it disposed of the case on the narrower ground of whether *Harlow v. Fitzgerald* entitled the State Officials to immunity. The court, confined to the historical question of whether political affiliation was a permissible criterion in April, 1983, did not explore that question in the context of any prospective activities, and the Court's restraint in refusing to generate dicta relative to the underlying issue was properly exercised.

that a bidder on a public contract does not possess a substantive property interest of constitutional magnitude. In *Riverview Investments v. Ottawa Community Improvement Corp.*, 769 F.2d 324 (6th Cir. 1985), the plaintiff contended that it was deprived of a fundamental property right when the defendant denied its application for industrial revenue bonds. In establishing that a property interest did not exist, the court noted that an enforceable claim of entitlement must be derived from "a statute or legal rule or through a mutually explicit understanding." *Id.* at 327, quoting *Leis v. Flynt*, 439 U.S. 438 (1979). Moreover, a protected property interest must be based on more than a subjective need, desire or expectation of receiving a benefit; rather, it must be based on a legitimate claim of entitlement that is created from a source independent of the Constitution, such as a state law. The court looked to Ohio law which made the issuance of bonds discretionary, and found that the plaintiff did not have a legitimate claim of entitlement. The authority relied upon by plaintiff in *Riverview* derived from a provision of the Ohio constitution which makes issuance of bonds discretionary. The statute of import in the case at bar also states that operation of concessions *may* be operated by contract or state employees is discretionary. O.R.C. 1501.09, p. 1.

Similarly, there is no Ohio law giving a right to be granted a state park concession contract. Nowhere on this subject has the Ohio Supreme Court or any Ohio court of lesser stature held that competitive park concession bidding statutes confer a property right upon disappointed bidders for public contracts; nor does Ohio law make the contracting agency or official liable in damages to the disappointed concession bidder. Petitioner's mere disappointment does not create a constitutional deprivation, consistent with this Court's decision in *Perkins v. Lukens Steel Corp., supra.*

In April, 1983, O.R.C. 1501.09 stated:

> *The public service facilities* mentioned in section 1501.07 of the Revised Code may be leased by the department of natural resources for the operation thereof as provided in section 1501.10

> of the Revised Code, or may be operated by any person, firm, partnership, association, or corporation under contract with the director of natural resources as provided in section 1501.091 of the Revised Code, or *may be operated by the department through the division of parks and recreation.* (p. 1; emphasis added.)

Under this authority, the State Officials enjoyed an absolute right to self-operate the Punderson State Park Golf Course in April, 1983. It was not clearly established in April, 1983, that a disappointed bidder on a concession contract enjoyed substantive due process rights. No opinion of the Supreme Court or the Sixth Circuit recognized any such right. Indeed, in April, 1983 when the action of the State Officials was taken, there was significant disagreement among the federal courts as to whether a bidder on a government contract enjoyed any constitutionally protected property interest. Compare *L & H Sanitation, Inc. v. Lake City Sanitation, Inc.*, 769 F.2d 517 (8th Cir.1985); *Teleprompter of Erie, Inc. v. City of Erie*, 537 F.Supp. 6 (W.D.Pa.1981); *Kendrick v. City Council of Augusta, Ga.*, 516 F.Supp. 1134 (S.D.Ga. 1981); and *Three Rivers Cablevision v. City of Pittsburgh*, 502 F.Supp. 1118 (W.D.Pa.1980) (all recognizing the possibility that such a property interest can exist) with *Coyne-Delaney Co. v. Capital Dev. Bd., supra; Sowell's Meats & Servs., Inc. v. McSwain*, 618 F.Supp. 140 (D.S.C.1985), *aff'd.*, 788 F.2d 226 (4th Cir.1986)(per curiam); *ARA Servs., Inc. v. School Dist. of Philadelphia*, 590 F.Supp. 622 (E.D.Pa. 1984); *J.P. Mascaro & Sons, Inc. v. Township of Bristol*, 497 F.Supp. 625 (E.D.Pa.1980); and *Estey Corp. v. Matzke*, 431 F.Supp. 468 (N.D.Ill. 1976)(all doubting the existence of such a property interest). This disagreement itself supports a finding that Petitioner did not enjoy any clearly established property right under the due process Clause.

Starting in 1981 with *Parratt v. Taylor*, 451 U.S. 527 (1981), and followed in 1982 by *Logan v. Zimmerman Brush Co.*, 450 U.S. 909 (1982), this Court moved to stem the tide of property cases coming into the federal courts on due process grounds by ruling that a deprivation of property under color

of state law, which was not readily curable by the implementation of pre-deprivation procedures, did not constitute a deprivation of property without procedural due process so long as the state provided an adequate post-deprivation remedy, such as a statutory or common law cause of action for conversion. In *Hudson v. Palmer,* 408 U.S. 517 (1984), this Court was ultimately to hold that even intentional property deprivations in violation of state or federal law cannot by their nature be remedied by pre-deprivation procedures, and accordingly do not violate procedural due process if the state provides an adequate post-deprivation remedy.

Under these cases it stands to reason that even if Ohio law had created a property interest in Petitioner's favor, no deprivation of procedural due process can be said to have occurred because Ohio law provided Petitioner with various adequate post-deprivation remedies. For example, Petitioner could have availed himself of action in the Ohio Court of Claims which, by statute, has full equitable and legal powers over suits within its jurisdiction. Another available remedy was an injunction action or a mandamus action in Ohio's common pleas courts, which have full equitable and legal powers to resolve controversies properly brought before them, *State ex rel. Heimann v. George,* 45 Ohio St. 2d 231, 344 N.E. 2d 130 (1976); *City of Dayton ex rel. Scandrick v. McGee,* 67 Ohio St.2d 356, 423 N.E.2d 1095 (1981) (permanent injunction prohibiting entry into contract with arbitrarily favored bidder); *State ex rel. United District Heating, Inc. v. State Office Bldg. Comm.,* 124 Ohio St. 413, 179 N.E. 138 (1931), aff'd on rehearing, 125 Ohio St. 301, 181 N.E. 129 (1932) (writ of mandamus compelling award to lowest bidder). Petitioner has no federal cause of action against the State Officials on procedural due process grounds because Ohio judicial remedies are perfectly adequate and provide all the process that is due. As the Sixth Circuit stated at 847 F.2d 1097, 1103:

> Indeed, there is no claim that the Ohio courts participated with the executive branch to refuse contracts to Republicans. Thus, the Ohio courts

> provide fair and nonarbitrary means of obtaining a remedy, and so provide due process. There is no showing that Ohio courts will deny Lundblad a remedy if he can prove his claim of discrimination based on party affiliation. Thus his procedural due process claim must fail.

(Petition, p. A.32). Petitioner possesses no substantive right which could support a review under the Due Process Clause. Nor can he point to any defect in the Ohio judicial system which could warrant review by this Court. Moreover, none of the substantive due process "assumptions" made by the Sixth Circuit were clearly established in April, 1983. It thus follows that the Sixth Circuit en banc reached the corret conclusion upon narrow grounds and properly limited its review and the scope of its holding to the particular facts at hand. It did not embark on an academic odyssey to explore constitutional matters outside the scope of the pleadings.

CONCLUSION

For the reasons stated above, the Petition for certiorari should be denied.

Respectfully submitted,

LEE FISHER
ATTORNEY GENERAL OF OHIO

By: **E. DENNIS MUCHNICKI**
Assistant Attorney General
Environmental Enforcement
30 East Broad Street, 25th FL.
Columbus, Ohio 43266-0410
(614) 466-2766
Counsel of Record
for Respondents

JOAN C. WEISER
Assistant Attorney General
Co-Counsel for Respondents